6-1917

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No. 333

(20,557.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 220.

ALBERT W. BROWN, PLAINTIFF IN ERROR,

vs.

THE ESTATE OF GEORGE N. FLETCHER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

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1 STATE OF MICHIGAN:

Supreme Court.

ALBERT W. BROWN, Claimant and Appellant,
vs.
ESTATE OF GEORGE N. FLETCHER, Deceased, Defendant and Appellee.

On or about April 6, 1904, Albert W. Brown, of Boston, Massachusetts, presented a claim against the estate of George N. Fletcher, deceased, to the Commissioners on Claims for examination and allowance, which claim was based upon a final decree of the Supreme Judicial Court in equity for the County of Suffolk, State of Massachusetts, in the case of Rufus H. Spalding, administrator of the estate of William White, deceased, plaintiff, *vs.* George N. Fletcher, James Campbell and Eliza White, defendants, as appears from the proof of his claim filed with the commissioners, a copy of which is contained in the bill of exceptions. The commissioners examined the claim, the hearing being concluded on Oct. 13, 1904, and on Dec. 2, 1904, filed a report disallowing the claim. On Jan. 16, 1905, the claimant, Albert W. Brown, duly filed an application for an appeal to the Circuit Court for the County of Wayne, an order allowing the appeal was duly made by the Probate Court, the claimant duly filed the bond required by the order allowing the appeal, gave notice of the appeal to the executors of the last will of George N. Fletcher, deceased, in accordance with the order allowing the appeal, which notice was served on the executors on Feb. 9, 1905, and procured and filed in the Circuit Court for the County of Wayne a duly certified copy of the record of the disallowance of his claim, of the application for and the bond on appeal filed in the Probate Court and of the order allowing such appeal, together with evidence that notice had been given to the executors.

2 *Bill of Exceptions.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

In re Estate of GEORGE N. FLETCHER, Deceased.

Appeal of Albert W. Brown.

On June 22, 1905, this cause came on for trial before Hon. Flavius L. Brooke, Circuit Judge; John Miner, Harrison Geer and Harold R. Martin, appearing for the claimant, and Henry M. Campbell and Daniel F. Altland, appearing for the estate. It was stipulated by the parties in open court that the jurors then sitting in the

case of Vreeland *vs.* Sutliffe *et al.* might be considered as jurors sitting in this cause and though then absent might be considered as though present.

To maintain and prove the issue on his part the claimant introduced the following evidence:

Exhibit 1, the claim presented before the Commissioners on Claims.

Exhibit 2, a duly certified copy of the record of the cause of Rufus H. Spalding, administrator of the estate of William White, deceased, complainant, *vs.* George N. Fletcher, James Campbell and Eliza White, defendants, in the Supreme Judicial Court of the Commonwealth of Masaschusetts, which included the following papers:

The bill of complaint, filed April 24, 1874; the subpœna; the answer of the defendant, Fletcher; answer of the defendant Campbell; answer of the defendant, White; order of reference to the Master; Master's report; objection to the Master's report; order of re-committal to Master; Master's report upon re-committal; exceptions to the Master's report; motion to summon the legal representatives of the defendant, Campbell; answer of the executors of Campbell's heirs; agreement for submission to arbitration; amendment to bill; answer of defendant, Frances M. Brown; agreement of reference to Hon. W. C. Endicott; agreement of reference to Hon. W. L. Putnam, order of reference to Hon. W. L. Putnam; suggestion of the plaintiff's death and petition of his successor for leave to appear; preliminary award of arbitrator W. L. Putnam; suggestion of death of defendant, Fletcher, and motion to summon the administrator, with the will annexed, of his estate; citation to Frank B. Cotton, administrator, with the will annexed; return of service of citation; petition of Frances M. Brown, complainant, to summon in heirs, etc., of George N. Fletcher, deceased; decree thereon; supplemental order of notice; return of service of notice on Frank W. Fletcher, Frank W. Fletcher, executor, Allen M. Fletcher, Allan M. Fletcher, executor, and Grace Fletcher King; order of court for Hon. W. L. Putnam, arbitrator, to
3 proceed *ex parte;* motion of Albert W. Brown, administrator; motion of Albert W. Brown, executor; motion of Albert W. Brown; final award; final decree; taxation of costs and docket entries in the case.

Exhibit 3, a duly certified copy of the proceedings of the Probate Court of Middlesex County, Massachusetts, in the matter of the estate of George N. Fletcher in that state consisting of the petition for the appointment of an administrator with the will annexed, the notice, the appointment of an administrator with the will annexed, the bond of the administrator, the inventory of the estate, petition for leave to sell real estate, order allowing the sale of real estate and final account of the administrator with the will annexed.

Exhibit 4, a duly certified copy of the appointment by the Probate Court of Suffolk County, Massachusetts, on December 26, 1902, of Albert W. Brown, as administrator *de bonis non* of the estate of William White, deceased.

Exhibit 5, a duly certified copy of the appointment by the Probate Court of Wayne County, on November 2, 1903, of Albert W. Brown,

as executor of the last will and testament of Frances M. Brown, deceased, including a copy of the will of Frances M. Brown.

Exhibit 6, a duly certified copy of the appointment by the Probate Court of Alpena county, Michigan, on March 15, 1904, of Albert W. Brown, as administrator *de bonis non* of the estate of William White, deceased.

Exhibit 7, the revised laws of Massachusetts of the issue of 1902.

Exhibit 10, the will of George N. Fletcher, which was probated in Wayne County, and the letters testamentary issued by said court on December 5, 1899, to Frank W. Fletcher and Allan M. Fletcher, as executors thereof; also the inventory of the estate filed in said
4 court on December 7, 1900, showing total assets amounting to $575,809.02.

ALBERT W. BROWN, sworn in his own behalf, testified:

Direct examination by Mr. MINER:

I reside in Boston, Massachusetts, and am the claimant in this case. I am the person referred to as the administrator *de bonis non* of the estate of William White, the executor of the last will of Frances M. Brown, and the person named in this decree which has been offered in evidence. I am familiar with the condition of the estate of William White in Michigan. There are no debts against the estate in Michigan. There are no valid debts against the estate in Massachusetts. There are no debts against the estates of Frances M. Brown. (The testimony as to the debts against the estate of William White and Frances M. Brown was admitted against the objection of the defendant estate as not being the proper way to establish the fact; also upon the ground of immateriality.)

Claimant rested.

To maintain and prove the issue on its part, the estate of George N. Fletcher introduced the following evidence:

Exhibit 8 (against the objection and exception of the claimant that the record speaks for itself and that the clerk can only certify as to what is in the record), a certificate of the clerk of the Supreme Judicial Court of Massachusetts, showing that there were no appearances in that court on behalf of the defendant estate after the death of George N. Fletcher on November 5, 1899, except the appearance of the administrator with the will annexed.

Exhibit 9 (against the objection and exception of the claimant on the same ground), a certificate showing the docket entries in
5 the cause after the death of George N. Fletcher.

Defendant rested.

Thereupon, counsel for the claimant moved the court to direct the jury to render a verdict in his favor for the amount due him, under the decree offered in evidence, which motion the court then and there overruled, and counsel for the claimant then and there duly excepted to the action of the court in so doing.

Thereupon, counsel for the defendant estate moved the court to

direct the jury to render a verdict in favor of said estate, disallowing the claim of the claimant, which motion the court then and there granted and assigned the following reasons for so doing:

Charge of the Court.

(A.) This is an appeal from the decision of the Commissioners on Claims of the defendant estate, by which decision the claim of the plaintiff was entirely disallowed. It was agreed upon the trial of the case that a jury should be considered to be in attendance, and that the determination of the court should take the shape of a direction to the jury to render a verdict either for or against the plaintiff claimant.

(B.) The facts of the case appear to be briefly as follows: On April 4th, 1874, a bill was filed in the Supreme Judicial Court of the Commonwealth of Massachusetts for Suffolk County, in equity, by one William White *vs.* George N. Fletcher, with the object of securing a discovery and accounting from said Fletcher. The defendant Fletcher was served with process within the commonwealth of
6 Massachusetts and appeared and filed his answer in the case. The suit was referred to a master. The master reported. Exceptions to the report were filed and argued, and on April 15th, 1891, the Master filed a supplemental report on recommittal. Exceptions were filed to this report also. On the 4th day of April, 1892, Rufus H. Spalding as administrator of White's estate and Frances M. Brown, daughter of said White, as plaintiffs, entered into an agreement with the defendant, George N. Fletcher, to submit the matters in difference between them to the Hon. William C. Endicott, of Salem, Massachusetts. The submission contains the following language: "The said Fletcher covenants, promises and agrees that he will, and his heirs, executors and administrators shall faithfully fulfill and perform all the terms and conditions of any award which may be made by said arbitrator.

* * * It being the intention of this submission to forever settle all controversies between all of said parties, and that the decease of any party shall not revoke said submission but that said arbitration shall continue, and that the successors of said Spalding and the legal representatives of said Brown and said Fletcher shall be bound by the final award therein."

In accordance with this submission, a rule of the court was afterwards, on the 18th day of October, 1893, entered in said cause, whereby it was referred to the determination of the Hon. William L. Putnam, pursuant to said articles of submission and on the 22nd day of May, 1894, the said arbitrator made his preliminary award, determining the liability of the defendant, and indicating the lines upon which an accounting should be had. Before a final award was made by said arbitrator and a decree of the court entered thereon, Frances M. Brown, the daughter of William White, died, and her husband, Albert W. Brown, was substituted as plaintiff in her stead as executor of her will and as administrator in the place of
7 Spalding, of the estate of William White. Likewise, before said proceedings had reached a final report of the arbitrator,

and a decree thereon, and on the 5th day of November, 1899, George N. Fletcher died testate at his domicile in the County of Wayne, State of Michigan.

(C.) After the death of said George N. Fletcher and on October second, 1901, a decree was entered in the Supreme Judicial Court of Suffolk County, Massachusetts, reciting most of the above facts and ordering that Frank W. Fletcher, Allan M. Fletcher, and Grace Fletcher, children of said George N. Fletcher, and Frank W. Fletcher and Allan M. Fletcher, executors of the last will and testament of the said George N. Fletcher, deceased, have until one month from the first Monday of October, current to appear in said cause, and upon default of appearance by that date, that the cause proceed before the arbitrator *ex parte* as to such parties. Notice of this order and decree was duly served in Michigan on Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, two of them executors of the will of George N. Fletcher, deceased, and all of them his children. Neither of the three appeared in Massachusetts either before the arbitrator or before the court.

(D.) After the death of George N. Fletcher and while the immediate foregoing proceedings were being held, one, Frank B. Cotton, was appointed administrator with the will annexed in Suffolk county, Massachusetts, of the estate of George N. Fletcher. And on April 14th, 1903, a final decree in the Supreme Judicial Court of Suffolk County, Massachusetts, was entered, by which it was found that there was due about $406,000 from the estate to George N. Fletcher, deceased, to the plaintiff claimant, Albert W. Brown. The decree runs against Frank B. Cotton, the Massachusetts administrator, with will annexed, against the executors of George N.
8 Fletcher, in the State of Michigan, and against Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, personally, the decree in terms stating that the three last named individuals shall pay whatever balance may remain due after applying all of the estate of George N. Fletcher, towards the payment of said claim.

(E.) After the rendition of said decree of the Supreme Judicial Court of Suffolk County, Massachusetts, the claimant, Albert W. Brown, applied for and secured a revival of the commission on claims in the County of Wayne, Michigan, in the estate of George N. Fletcher, deceased, and submitted his claim to the said Commission. He produced and offered in evidence before said commission a certified copy of the decree above referred to and all the record, proceedings of the Massachusetts court upon which said *decree* is based. The commissioners denied the claim in toto. Thereupon the plaintiff claimant appealed to the Circuit Court for the County of Wayne.

(F.) The first question involved in the case is whether or not the Supreme Judicial Court of Suffolk County, Massachusets, had jurisdiction to pronounce final decree in the case, which it did, after the death of George N. Fletcher, binding not only his estate in Massachusetts, but likewise his estate in Michigan and beyond his estate, binding his heirs at law, to pay whatever residue might remain unpaid after the application of his entire estate upon the claim found by said decree to be due.

(G.) It is conceded by the defendant estate that the Massachusetts courts, having secured jurisdiction in the case, and ancillary administration having been secured in Massachusetts, that the decree of that court would bind such estate as George N. Fletcher died seized of within the territorial limits of Massachusetts.

(H.) The plaintiff claimant urges the existence of this
9 jurisdiction upon two grounds; first, because of the language contained in the agreement of submission to the effect that the death of Fletcher should not abate the action, but that his heirs should answer any decree that might be made; and, secondly, because ancillary administration was taken out in Suffolk County, Massachusetts, and that a decree having gone there against his administrator with will annexed in Massachusetts, the same can be enforced against his domiciliary executors in Michigan.

(I.) After a careful consideration of the questions involved, I have reached the conclusion:

First. That to give to the agreement of submission the scope claimed for it by the plaintiff claimant, would be to admit the soundness of the doctrine that jurisdiction not otherwise possessed by a court may be conferred upon it by agreement of the parties, for nothing is clearer than that without the agreement in question, the Massachusetts court would have had no power, after the death of George N. Fletcher to make a decree against him or his estate or heirs, which would bind either it or them outside of the territorial limits of Massachusets. It seems obvious, therefore, that if the agreement for submission is to receive the broad construction claimed for it by the plaintiff, we must conclude that a party in his life time may confer upon a court a jurisdiction to do acts and bind parties and estates which it otherwise would not have.

(J.) Upon the death of George N. Fletcher and the failure of his executors or heirs to appear in the Supreme Judicial Court of Suffolk County, Massachusetts, and continue the litigation there, there clearly arose a breach of contract made by him in his life time. What rights accrued to the plaintiff upon this breach, and what remedies for the enforcement of those rights were possessed
10 by him, I do not here attempt to determine. I am clear, however, that neither the right nor the remedy is such as is contended for by the plaintiff here.

(K.) The prosecution of a claim against the estate of one deceased is a proceeding *in rem Lafferty vs. People's Savings Bank, 76 Michigan,* 51. And jurisdiction of proceedings *in rem* is established by the sovereign authority, and cannot be effected by agreement or consent of parties, whatever their rights may be in that regard, as to actions *in personam.*

(L.) Upon the other question, I am of the opinion that the decree of the Massachusetts courts against an ancillary administrator cannot be enforced against the domiciliary executors. It is true that there is some authority to the effect that where a decree is obtained against the domiciliary executors, it may be enforced against the ancillary administrator with the will annexed in another jurisdiction. That condition of affairs is, however, I think, clearly distinguish-

able from the case at bar. It is obvious from the fact that the executors of Fletcher in Michigan declined to appear in the Massachusetts court, that the ancillary administrator there was appointed at the instance of the plaintiff claimant. It is likewise to be presumed that an administrator so appointed would undertake no serious defense to the claim made in Massachusetts, and it seems to me that it would be improper upon principle to say that a judgment obtained against an ancillary administrator under such circumstances should be enforced against the domiciliary executors.

But aside from the inherent impropriety of such a course, the matter is, in my opinion, clearly established by authority of our own courts.

See Aspden *et al. vs.* Nixon, *et al.*, 4 Howard, 467.
Hill *vs.* Tucker, 13 Howard, 358.
Lowe *vs.* Bartlett, 8 Allen, 266.

11 (M.) It is argued that the executors and heirs of George N. Fletcher had notice of the proceedings, and that it was their moral if not their legal duty to have appeared and contested the proceedings. This may be true and yet it seems to me that those executors and heirs never having been within or submitted themselves to the jurisdiction of the Massachusetts court might choose the forum in which the claim against their ancestor should be litigated; that they did choose to litigate that claim in the domicile of their ancestor is obvious from their failure to appear in the Massachuset-s court, and that this was their legal right it seems to me is clear.

(N.) Several other objections are raised to the validity of the claim and the regularity of the proceedings on the part of the defendant estate, but inasmuch as those already noticed, are, in my opinion, fatal to the prosecution of the claim in its present form in this jurisdiction, I do not deem it necessary to examine them.

I am of the opinion that the claim of the plaintiff was properly disallowed by the commissioners and the jury is therefore instructed to render a verdict to that effect.

Thereupon, counsel for the claimant duly excepted to the action of the court in granting the motion of counsel for defendant estate.

Thereupon, the jury, under the instructions of the court, rendered a verdict in favor of the defendant estate.

Afterwards, and on September 9, 1905, judgment was duly entered on the verdict in favor of the defendant estate.

12 *Motion for New Trial.*

On November 2, 1905, the claimant moved the court to set aside the verdict and judgment and order a new trial for the following reasons:

1. The court failed to give full faith and credit to the records and judicial proceedings in the case of Rufus Spalding, administrator

of the estate of William White, deceased, plaintiff, *vs.* George N. Fletcher, James Campbell and Eliza White, defendants, in the Supreme Judicial Court in Equity for the County of Suffolk, State of Massachusetts, a duly authenticated copy of which was introduced in evidence on the trial of this cause, in accordance with Article 4, Section 1, of the Constitution of the United States.

2. The court failed to give the records and judicial proceedings in the case of Rufus Spalding, administrator of the estate of William White, deceased, plaintiff, *vs.* George N. Fletcher, James Campbell and Eliza White, defendants, in the Supreme Judicial Court in Equity for the County of Suffolk, State of Massachusetts, a duly authenticated copy of which was introduced in evidence in this cause, such faith and credit as they have by law or usage in the courts of the State of Massachusetts, in accordance with Section 905 of the Revised Statutes of the United States.

This motion was based upon the records and files in this cause, and upon the evidence and proceedings on the trial thereof.

Motion Denied.

The circuit judge denied said motion, assigning the following reasons for so doing:

1. That, in his opinion, the court did give full faith and credit to the records and judicial proceedings in the case of Rufus
13 Spalding, administrator of the estate of William White, deceased, plaintiff, *vs.* George N. Fletcher, James Campbell, and Eliza White, defendants, in the Supreme Judicial Court of Equity for the County of Suffolk, State of Massachusetts, in accordance with Article 4, Section 1, of the Constitution of the United States.

2. That, in his opinion, the court did give to the records and judicial proceedings in the case of Rufus Spalding, administrator of the estate of William White, deceased, plaintiff, *vs.* George N. Fletcher James Campbell and Eliza White, defendants, in the Supreme Judicial Court in Equity for the County of Suffolk, State of Massachusetts, such faith and credit as they have by law or usage in the courts of the State of Massachusetts, in accordance with Section 905 of the Revised Statutes of the United States, and for reasons more fully set forth in his opinion filed herein upon the termination of the cause.

The claimant then and there duly excepted to the action of the circuit judge in overruling said motion and to each of the reasons assigned by him for such action, viz.:

1. The court did give full faith and credit to the records and judicial proceedings in the case of Rufus Spalding, administrator of the estate of William White, deceased, plaintiff, *vs.* George N. Fletcher, James Campbell and Eliza White, defendants, in the Supreme Judicial Court in Equity for the County of Suffolk, State of Massachusetts, in accordance with Article 4, Section 1, of the Constitution of the United States.

2. The court did give to the records and judicial proceedings in the case of Rufus Spalding, administrator of the estate of William White, deceased, plaintiff, *vs.* George N. Fletcher, James Campbell and Eliza White, defendants, in the Supreme Judicial Court in Equity for the County of Suffolk, State of Massachusetts, such
14 faith and credit as they have by law or usage in the courts of the State of Massachusetts, in accordance with Section 905 of the Revised Statutes of the United States.

Exhibit 1.

Claim Presented to Commissioners.

State of Michigan:

Probate Court for the County of Wayne.

Matter of the Estate of George N. Fletcher, Deceased.

To Frederick W. Whiting and Charles A. Rathbone, Commissioners on Claims in said matter.

Gentlemen: You are hereby notified that Albert W. Brown is a creditor of said estate in the sum of four hundred and four thousand two hundred and fifty-four dollars and twelve cents ($404,254.12), and interest thereon at the rate of six (6) per cent. per annum, from the fourteenth day of April, 1903.

Said claim is based upon the final decree of the Supreme Judicial Court for the Commonwealth of Massachusetts entered on the fourteenth day of April, 1903, and which decree was entered in a suit in said court to which the said George N. Fletcher, deceased, in his lifetime, was a party defendant, and which decree purports to and does bind the estate of the said decedent to the payment of the full amount decreed to be paid, as aforesaid, under its provisions.

A copy of the said decree and the proceedings in said suit, duly certified and attested under the act of Congress and the law of
15 this State, is ready to be produced and proved before you as the commisioners on claims in said estate, and the said claimant, Albert W. Brown, does and will claim for the said decree when produced and proven according to law, the same full force, faith and credit to which the same is entitled under the laws of the said Commonwealth of Massachusetts, within the State of Michigan, against the estate of said George N. Fletcher, deceased.

The said Albert W. Brown therefore demands and claims against the estate of the said George N. Fletcher, deceased, the full sum of $404,254.12, with interest thereon at the rate of six (6) per cent. per annum from the 14th day of April, 1903.

You are also notified, that the said claimant is now ready to present and prove his said claim without delay, and you are respect-

fully requested to fix an early date for the hearing thereof in accordance with the statute in such case made and provided.

Dated April 6th, 1904.

ALBERT W. BROWN,
By JOHN MINER,
His Attorney.

JOHN MINER,
Attorney for Claimant.

Business address: 52 Buhl Block, Detroit, Mich.

COUNTY OF WAYNE, *ss:*

On this 6th day of April, 1904, before me, the undersigned, a notary public in and for said County of Wayne, personally appeared John Miner, who signed the foregoing claim and notice on behalf of Albert W. Brown, the claimant therein named, as the attorney of said claimant, and who, being by me duly sworn, did depose and say that he is the attorney for said Albert W. Brown, the claimant
16 named in said claim, and has authority to sign the foregoing on behalf of the said Albert W. Brown, and he further says that the reason the same was not signed by the said Albert W. Brown personally is that the said Brown is a non-resident of the State of Michigan, and was not within the said State of Michigan when the same was prepared and signed. Deponent further says, that the matters stated in said foregoing claim are true to the knowledge of deponent.

PETER J. ABT,
Notary Public, Wayne County, Michigan.

My commission expires Feb. 19th, 1906.

EXHIBIT 2.

Record in Case of Rufus H. Spalding, Adm'r, vs. Geo. N. Fletcher, et al.

COMMONWEALTH OF MASSACHUSETTS:

I, Marcus Perrin Knowlton, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts, do certify that John Noble, Esquire, whose signature is — affixed to the papers hereto annexed, is clerk of said court, holden at Boston, in and for the County of Suffolk, in said commonwealth, and hath the keeping of all the ancient files, records, and proceedings of said court throughout the commonwealth, down to the first day of August, A. D. 1797, as well as of the files, records and proceedings of said court holden as aforesaid, for said County of Suffolk, subsequent to that time; and is, by law, the proper person to make out and to certify copies of all the records and proceedings of the said Supreme Judicial Court previous to the said first day of August, A. D. 1797, as well as of all records

and proceedings of the said court, holden as aforesaid, for the
17 said County of Suffolk, subsequent to that time; and that full faith and credit is and ought to be given to his acts and attestations, done as aforesaid, and that his attestation to the papers hereunto annexed is in due form.

In Testimony Whereof, I have hereunto set my hand and caused the seal of said court to be hereunto affixed, this fifth day of September, in the year one thousand nine hundred and three.

MARCUS PERRIN KNOWLTON,
[SEAL.] *Chief Justice.*

(*Bill of Complaint.*)

COMMONWEALTH OF MASSACHUSETTS:

To the Honorable the Justices of the Supreme Judicial Court, sitting in equity for the County of Suffolk, in said Commonwealth:

Rufus H. Spalding, of Boston, in said county, as he is administrator of the goods and estate of William White, late of said Boston, who died April 28th, 1873, brings this his bill of complaint against George N. Fletcher, of Detroit, in the State of Michigan, now commorant of said Boston, James Campbell, of said Boston, Bookseller, & Eliza White, also of said Boston, widow of said William, and thereupon your orator complains & says, that he was duly appointed administrator as aforesaid by the Probate Court of said County of suffolk, on the second day of June, A. D. 1873, & that he forthwith gave bond according to law and entered upon the execution of said trust.

That said intestate during the last twenty years of his life and up to the time of his decease was engaged in extensive business transactions with said George N. Fletcher and in their business relations they were intimately & closely connected in investments &
18 operations for their joint account and benefit in said State of Michigan in the purchase and sale of lands therein in lumbering operations in the construction of a dam at or near Alpena in said State & in river & harbor improvements at a place called Thunder Bay & in these & other joint business transactions said intestate invested large sums of money which were intrusted to said Fletcher and by him used for their joint account & benefit and your orator is informed & verily believes that there has been a large increase in the value of said investments & that the same have been productive of large gains & profits, that sales have been made of said joint property and proceeds received & retained by said Fletcher and sometimes reinvested by him & that large sums have been received as income from said investments and the same are now retained by said Fletcher,—that said Fletcher had the chief management & principal control of said investments and kept the accounts thereof and has in his possession books of account, deeds, vouchers & statements relating thereto and refuses to exhibit & disclose the same to your orator but has concealed & does now conceal the same & the true state of the accounts between him & said intestate from your orator, and refuses to render

an account to & account with your orator for the interest of said intestate in the proceeds of said business transactions & for the credits due the estate of said deceased and refuses to disclose to your orator the true nature of said joint business transactions so that your orator is unable to administer according to law the goods chattels rights and credits of said intestate, and your orator further shows that said Campbell claims to have some interest in said joint transactions & investments or some portion thereof and said Campbell has in his possession, books of account, deeds, vouchers, statements of account & other papers which exhibit in part, & to some extent, the nature of said transactions and the interest of said intestate therein
19 and that said Campbell has also in his custody & possession, books, papers, deeds & vouchers & other instruments in writing which were & are the sole property of said intestate and your orator avers that the exhibition & examination of said books, accounts, vouchers & papers, will disclose a large & just indebtedness of said Campbell to said intestate; but your orator avers, that said Campbell though often requested & has refused & still refuses to allow any examination to be made of the books and accounts & vouchers which relate or appertain to the joint business transactions aforesaid and conceals & refuses to deliver up to your orator sundry books & papers & letters which were the sole property of the intestate & to which your orator is entitled as administrator.

And your orator avers that said Eliza White combining & confederating with said Fletcher & said Campbell has concealed & does now conceal, important & valuable books deeds, vouchers,—letters from said Fletcher to said intestate, all containing valuable information relating to the estate of said intestate and to his joint transactions & dealings with said Fletcher & Campbell, and said Eliza though often requested, refuses to deliver up to your orator all the books & papers of the deceased but in fraud of your orators rights has delivered the same or some part thereof into the custody & possession of said Campbell.

All of which actings, doings, refusals and pretenses are contrary to equity and good conscience and tend to the manifest wrong and injury of your orator in the premises.

In consideration whereof, and for as much as your orator is remediless at and by the strict rules of the common law, and cannot have adequate relief save in a Court of Equity, where matters of this and like nature are properly cognizable and relievable;

To the end therefore, that the said defendants may, if they
20 can, show why your orator should not have the relief hereby prayed, and may, according to the best and upmost of their several and respective knowledge, remembrance, information and belief, full, true direct and perfect answer make to all and singular the matters aforesaid, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator;

Your orator prays as follows: that the defendants Feltcher & Campbell may make a full and true discovery and disclosure of and concerning all and singular the transactions and matters aforesaid and that an account may be taken by and under the direction &

decree of this Honorable Court of all dealings and transactions between said plaintiff's intestate and said defendants Fletcher and Campbell and each of them. That the balance which shall or may be found due from either of said defendants severally or both jointly to said intestate may be decreed to be paid by either or both severally or jointly as the same may be found due and that all said defendants may set forth a list or schedule & description of every deed, book, account, letter, paper or writing, relating to the matters aforesaid or either of them or wherein or whereupon there is any note memorandum or writing relating in any manner thereto in their or either of their possession or power and may deposit the same in the office of the Clerk of this Honorable Court for the usual purposes, (except that said Fletcher may deposit sworn copies of such writings) otherwise that the defendants may account for such as are not in their possession or power.

May it please your Honors to grant unto your orator not only a writ of injunction issuing out of and under the seal of this Honorable Court to be directed unto the said James Campbell and Eliza White and George N. Fletcher to restrain him and them and each of them from removing or destroying or transferring to any other person any of said deeds books acounts letters papers or writ-
21 ings but also a writ or writs of subpœna—to be directed to the said George N. Fletcher James Campbell and Eliza White, thereby commanding them & each of them at a day certain, and under a certain penalty therein to be limited personally to be and appear before this Honorable Court, and then and there full, true, direct and perfect answers make to all and singular the premises and further, to stand to, perform and abide such further order, direction and decree therein as to this Honorable Court shall seem meet.

(S'g'd) RUFUS H. SPALDING.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

On this day of April 24th, before me personally appeared the within named Rufus H. Spalding and made oath that he has read the within Bill subscribed by him, and knows the contents thereof, and that the same is true to his own knowledge, except as to matters which are therein stated to be on his information and belief and as to those matters he believes them to be true.

(S'g'd) AUGUSTUS RUSS,
Justice of the Peace.

(On back:) 26. 574. Eq. Bill in equity. R. H. Spalding, adm'r, pl'ff. Geo. N. Fletcher *et al.*, def'ts. Filed April 24, 1874. (S'g'd) Att. Geo. W. Nichols, asst. clerk. From the office of Augustus Russ 15 Pemberton Square.

22 (*Return of Service Subpœna.*)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

To George N. Fletcher of Detroit, in the State of Michigan, now commorant of Boston, in said County of Suffolk, James Campbell of said Boston, bookseller, and Eliza White, also of said Boston, widow, Greeting:

We command you that you appear before the clerk of our Supreme Judicial Court, at the Rules, to be holden at his office in Boston, without our said County of Suffolk, on the first Monday of June next, then and there to answer to a bill of complaint exhibited against you in our said court, by Rufus H. Spalding of said Boston, as he is administrator of the goods, & estate of William White, late of said Boston, deceased, and to do and receive what our said court shall then and there consider, in this behalf.

Hereof fail not, under the pains and penalties, in the law, in that behalf provided.

Witness, Horace Gray, Esquire, at Boston, the twenty-fourth day of April in the year of our Lord one thousand and eight hundred and seventy-four.

(S'g'd) GEO. W. NICHOLS,
Ass. Clerk.

SUFFOLK, *ss:*

BOSTON, *April 24th,* 1874.

I this day served the within subpœna upon the within named George N. Fletcher by giving to him in hand an attested copy
23 of the same for his appearance at court. On the 25th day of said April, I served this subpœna upon the within named James Campbell and Eliza White by delivering to said Campbell an attested copy of the same and by leaving a like copy at the last and usual place of abode of said Eliza White for their appearance at court as within directed.

(S'g'd) JOHN B. O'BRIEN,
Dep. Sheriff.

Services & travel	1.58
Copies	3.00
	$4.58

(On back:) No. 26. Subpœna. Rufus H. Spalding, adm'r, *vs.* Geo. N. Fletcher *et al.*

(*Answer of G. N. Fletcher.*)

COMMONWEALTH OF MASSACHUSETTS:

The Supreme Judicial Court for the County of Suffolk. In Equity.

The several answer of George N. Fletcher to the bill of complaint of Rufus H. Spalding, administrator of the estate of William White, late of Boston, in said County of Suffolk, complainant, against him the said Fletcher, James Campbell and Eliza White, defendants.

This defendant saving and reserving to himself all manner of benefit and advantage of exception that can be had or taken to the errors and imperfections in said bill contained for answer thereto or to so much as he is advised is necessary or material for him to make answer to, answering says:

1. He admits the death of William White and that said complainant was appointed administrator of his estate as alleged in said bill.

24 2. He denies that said William White during the last twenty years of his life and up to the time of his decease was engaged in extensive business transactions in the State of Michigan in the purchase and sale of lands therein or in lumbering operations or in the construction of a dam near Alpena or in river and harbor improvements near Thunder Bay.

3. He denies that said White invested any large sums of money in these and other transactions or that the said moneys were invested by this defendant for the joint benefit of himself & said White.

4. He denies that he has in his possession or under his control any books of account vouchers, or papers relating to any such transactions which he refuses or has refused to exhibit to the complainant, or that he is or has been guilty of any concealment of accounts as is charged in said bill.

5. And further answering this defendant says that about the year 1855 this defendant and one Thomas Campbell became owners of a considerable tract of pine lands in the County of Alpena, Michigan, which they purchased from the government on their joint account the title to which lands for the sake of convenience was taken in the name of said Thomas Campbell, but in fact said Campbell and defendant were equally interested in and owned equal interest in said lands. That it was the agreement and understanding between defendant and said Campbell to enter into business of lumbering upon said lands as partners and that said land- were acquired for the purposes — said partnership and the consideration for said lands were paid for by the joint means of this defendant and said Campbell. Before lumbering operations under said agreement were commenced and in about the year 1856 said Thomas Campbell died intestate

at or near Boston aforesaid. That shortly before his death
25 he directed that one-half of his property should go to his nephew Newell Campbell to become the property of said Newell, and that the other half of his property should become the property of his, said Thomas Campbell's parents during their natural lives and after their death that the same should go and become the property of his said Thomas' brothers and sisters. That as defendant is advised the apparent legal title to said pine lands as well as to all other real property belonging to said Thomas upon his death vested in John Campbell his surviving father, said Thomas being unmarried and without children.

That about the year 1858 said John Campbell knowing the facts connected with the title to said pine lands, and knowing and recognizing the interest of defendant therein and the intention of defendant and said Thomas in respect thereto executed a deed thereof whereby he conveyed the same to this defendant and to James Campbell and William White, the complainants intestate who then intended to enter upon lumbering operations upon said lands under the name of Thunder Bay Lumber Company. Defendant cannot now state the precise date of said deed but the same is recorded in the Register's Office for Alpena County aforesaid and he refers to the record thereof there appearing. That previous to the execution of said deed said James Campbell had been appointed administrator of the estate of said Thomas Campbell and said White had been appointed guardian of said Newell Campbell who was then a mere child and that they were named in said deed as grantees simply because they stood in such representative capacity and that it was not the intention of any of the parties that said deed should vest in the said Campbell or said White any title to said lands individually in their own
right but simply as administrator and as guardian re-
26 spectively. That said Campbell has always admitted and insisted that he had no personal interest in said lands under said deed but only as representing the estate of said Thomas Campbell who was his brother.

That to the best of defendant's knowledge and belief said White never invested any money or capital in said lands during his lifetime and never claimed any personal interest in said lands but only as guardian of said Newell and as holding under said deed in trust for said Newell.

And this defendant further answering says that in his lifetime said Thomas Campbell's interest in said lands was an equal interest with that of defendant therein and that under said deed from said John Campbell an equal undivided one half interest in said lands vested in this defendant, and that he is still the owner thereof and the remainder became vested in said James Campbell and White in trust for the benefit of the persons whom they represented as administrator and guardian as aforesaid.

And further answering defendant says: that no lumbering operations were ever carried on upon said lands by said Thunder Bay Lumber Company. But that this defendant sold a small amount of stumpage upon said lands and that all moneys ever received by him

in connection with the same has been fully accounted for and paid over to said White and said Campbell who have always acted simply in their representative capacity as aforesaid in relation to the transactions between them and defendant and not otherwise. And he denies that he has in his hands or under his control any moneys effects in which the said complainant has any interest or respecting which defendant is under any obligation whatever to account to said complainant.

And further answering defendant says that the said Newell Campbell the ward of said White before the bill in this cause was
27 filed became of age towit, twenty-one years of age, and that the only liability if any exists on the part of the defendant to account for the interest in said property which nominally stood in the name of said White is as he is advised to account to said Newell Campbell and not to the complainant in this cause. And he submits and insists that the complainant in this cause has no just or legal right to any such accounting or disclosure as is sought by him in this cause.

And further answering defendant says that he is a resident of Michigan that said complainant as administrator of the estate of said William White prior to commencement of this suit, made application to the Probate Court for Alpena County in Michigan for an order that he defendant appear before said Probate Court to submit to an examination respecting the same matters which were alleged in the bill in this cause, and that in obedience to a citation issued by said Probate Court this defendant did appear and was fully examined by said Spalding or his counsel, and that said Spalding is now fully possessed of all the facts relating to the matters set forth in said bill.

This defendant admits that James Campbell claims an interest in the property herein before referred to but only in his representative capacity as herein before stated.

He has no knowledge whatever respecting books, papers, deeds or vouchers in the possession of said James Campbell as charged in said bill. Nor has he any information or belief respecting the indebtedness from said Campbell to said complainants intestate as charged in said bill.

And he denies all unlawful confederacy as charged in said bill and he submits that the complainant has not in his said bill made or stated such a cause as doth or ought entitle him to any such
28 relief as in said bill prayed for and hopes to have the same benefit of this defence as though he had specially demurred to said bill, and prays to be hence dismissed with his reasonable costs in this behalf contained.

(S'g'd) GEO. N. FLETCHER.

(On back:) No. 26. In equity. R. H. Spalding, adm'r, *vs.* Geo. N. Fletcher & *al.* Filed July 15, 1874. (S'g'd) Att. G. C. Wilde, cl'k. Answer of Geo. N. Fletcher. Lyman Mason, att'y for def'ts.

(*Answer of Jas. Campbell.*)

SUFFOLK, *ss:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING, Administrator,
vs.
GEORGE N. FLETCHER, JAMES CAMPBELL and ELIZA WHITE.

The several answer of James Campbell, one of the above-named defendants, to the bill of complaint of the above named complainant.

This defendant, saving and reserving to himself, all manner of benefit and advantage of exception that can be had or taken to the errors and imperfections in said bill contained, for answer thereto, or to so much as he is advised is necessary or material for him to make answer unto, answering says,

29 I. He admits that said William White died at or about the time alleged in said complainant's bill of complaint, and that said complainant was appointed administrator as alleged in said Bill.

II. This defendant says that he has been informed and believes that said William White in his life time was engaged in certain transactions with one George N. Fletcher, named in said bill of complaint, growing out of certain transactions between said Fletcher and one Thomas Campbell, a deceased brother of this defendant, but whether said White became interested with the said Fletcher in any business transactions, or how extensively or how intimately and closely they were connected in investments and operations for their joint account and benefit, if any they had in the State of Michigan, in the purchase and sale of lands therein, or in lumbering operations, or in the construction of a dam at or near Alpena in said State or in the construction of a dam at a place called Thunder Bay, this defendant is ignorant of his personal knowledge, but on information and belief, this defendant denies that said White was interested in any transaction with said Fletcher except such as grew out of the settlement of the estate of said Thomas Campbell deceased.

III. This defendant on information and belief also denies that said White invested any large sums of money on joint account with said Fletcher or that he was entitled to any increase or gains or profits or proceeds on account of any such alleged investment or reinvestments.

IV. This defendant is ignorant whether said Fletcher has in his possession any books of account, deeds, voucher & statement relating to any transactions with said White or his legal representatives, to which the legal representatives of said White have any right, or in which they have any interest. And he is also ignorant whether

said Fletcher has any account to render to said complainant,
30 or any proceeds of any business transactions or credits due the estate of said White deceased, which he refused to disclose or pay over to the complainant but on information and belief he denies that the allegations of said bill of complaint are true.

V. This defendant further says that that he denies that he claims any interest in any joint transactions, between said Wiliam White and said Fletcher, to which or any part thereof said deceased or his legal representatives have any right or interest.

VI. This defendant also denies that he has or ever had in his possession, any books of account, deeds, vouchers, statements of account or other papers, which exhibit in part or in whole the nature of any joint transactions with said intestate, as alleged in said bill of complaint, or any interest of said intestate therein and this defendant also denies that he has in his custody and possession books and papers, deeds and vouchers, and other instruments in writing which were and are the sole property of said intestate or that he has any books, accounts, vouchers, which papers will disclose a large and just indebtedness of this defendant to said intestate, as the same was not true in fact, but on the contrary this defendant avers that, at the decease of said intestate the only business between them was that said White had procured to be discounted for this defendant two notes, which were unpaid at the decease of said White, one for one thousand dollars, and one for five hundred dollars which are still unpaid, and on the other hand the said White owed him on account of goods sold & money advanced, the sum of about eight hundred dollars.

VII. This defendant also denies that he has ever refused to allow said complainant to make any examination of any and all books, accounts and vouchers which this defendant has in his possession and control, which relate to any joint business or transaction with
31 said White or said Fletcher, or that he has concealed or refused to deliver up to the complainant any books, papers or letters, which were the sole property of the said intestate to which said complainant is entitled as administrator.

VIII. This defendant denies any and all manner of combining or confederating with said George N. Fletcher and said Eliza White or either of them or that he has concealed or does now conceal, important and valuable books, deeds, vouchers or letters from said Fletcher containing valuable information relating to the estate of said intestate and to his joint transactions and dealings with said Fletcher, this defendant and said Eliza White, or that he has ever received from said Fletcher said Eliza White or any person or party any books, papers, vouchers, or documents belonging to the estate of said intestate or to which his representatives have any right or interest.

And this defendant further says that some time about the year 1856, one Thomas Campbell, a brother of this defendant, now deceased, and said Fletcher, entered into an arrangement with each other whereby they became the owners of a large tract of pine land, in the County of Alpena and State of Michigan, on joint account the title to which land, as a matter of security and for convenience stood

in the sole name of said Thomas Campbell, but was in fact the property of said Thomas Campbell and said George N. Fletcher, and paid for on joint account and equally owned by each, and that it was the agreement and understanding of said Thomas Campbell and said Fletcher, that they should enter upon the lumbering business on said land as partners, that before any business in manufacturing lumber was commenced, to wit: on July 16th, 1857, said Thomas Campbell died near Boston, intestate, but on his death bed and shortly before his decease the said Thomas Campbell made the following declarations in regard to the disposition of his per-
32 sonal and real estate, in the presence and hearing of the family of which Mrs. Eliza White, the wife of this defendant, Fanny M. White now wife of Albert W. Brown and this defendant, are the only survivors; that is to say: After all his just debts were paid his father and mother both of whom were then living, should have all they wanted during their several lives, that his nephew, the son of a deceased sister, then about four years of age, whose name was Newell Campbell Rogers, whom he intended to bring up as his own son, should have half of the goods and estate remaining after the decease of the father and mother of him, said Thomas Campbell, that the name of said nephew should be changed from the said name of Newell Campbell Rogers to that of Newell Rogers Campbell, that said William White should be his guardian, that if the said nephew should die, without issue then his share should belong to the said Eliza White, and the other half of his goods and estate was otherwise disposed of, and that the said William White and this defendant should hold and manage all of the said goods and estate, of said Thomas Campbell for the purpose of carrying his wishes into full effect.

And the defendant further says that all the said lands in Michigan were understood to be held in the name of said Thomas Campbell for the joint account of said Fletcher and the said Thomas Campbell, and after his decease in order to carry out the wishes of the said Thomas Campbell, as the legal title to said lands of said Thomas Campbell vested in John Campbell, his father, said Thomas having died unmarried and without children, the said John Campbell knowing the facts connected with the transactions of said Thomas Campbell and said Fletcher; in the said lands, and intending to carry out the wishes of his deceased son, Thomas Campbell, and his obligations and duties, executed a deed of the said lands in said Michigan, one undivided half to said Fletcher, and the other half to said
33 William White and this defendant, that previous to the execution of said deed this defendant had been appointed administrator, of the estate of said Thomas Campbell, deceased, and said William White had been appointed Guardian of said Newell Rogers Campbell, and that said James Campbell and said William White were named in said deed, as Grantees simply becaues of their respective representative capacities, and that it was not intended nor understood that any title to said lands should vest in them or either of them individually in their own right, but as representing the estate of said Thomas Campbell, that to the best of this defendant's knowledge

and belief said White never invested any money or capital of his own in said lands during his life time and never claimed any personal interest in said lands but only as Guardian of said Newell, and as holding under said deed in trust for said Newell Rogers Campbell.

And this defendant further says that he has no knowledge or information of how much said White may have received from said Fletcher during his life time as proceeds from any sale of said lands or on account of stumpage on the same but whatever he may have received this defendant is informed and believes should be accounted for by the estate of said William White, to the said Newell Rogers Campbell the former ward of the said William White and that the estate of said intestate has no right or interest therein.

And this defendant denies that any other matter cause or thing in said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered confessed traversed and avoided or denied is true to the knowledge and belief of this defendant.

34 And this defendant submits that the complainant has not in his bill of complaint shown any case in equity or case entitling him to proceed against this defendant in this Honorable Court, and this defendant prays, all such benefit as if he had demurred to said bill of complaint.

JAMES CAMPBELL.

(On back:) No. 26. (In equity.) R. H. Spalding, adm'r, *vs.* Geo. N. Fletcher & *al.* Filed July 15, 1874. (Sgd.) Att. G. C. Wilde, cl'k. Answer of James Campbell. Lyman Mason, att'y for def'ts.

(*Answer of Eliza White.*)

SUFFOLK, *ss:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING, Adm'r,
vs.
GEO. N. FLETCHER, JAMES CAMPBELL, & ELIZA WHITE.

The several answer of Eliza White, one of the above-named defendants, to the bill of complaint of the above-named complainant.

This defendant, saving and reserving to herself, all manner of benefit and advantage of exception that can be had or taken to the errors and imperfections in said bill contained, for answer thereto, or to so much as she is advised is necessary for her to make answer unto answering says,

35 I. She admits that said William White died at or about the time alleged in said complainant's bill of complaint, and that said complainant was appointed administrator as alleged in said bill.

II. The defendant says that she has been informed and believes,

that said William White, in his life time was engaged in certain transactions with one George N. Fletcher named in said bill of complaint growing out of certain transactions between said Fletcher and one Thomas Campbell a deceased brother of this defendant, but whether said White became interested with said Fletcher in any business transactions or how extensive or how intimately or closely they were connected in investments and operations for their joint account and benefit if any they had in the State of Michigan in the purchase and sale of lands therein or in lumbering operations, or in the construction of a dam at or near Alpena in said State, or in the construction of a dam at a place called Thunder Bay, this defendant is ignorant of her personal knowledge, but on information and belief this defendant denies that said White was interested in any transactions with said Fletcher except such as grew out of the settlement of the estate of said Thomas Campbell deceased.

III. This defendant on information and belief also denies that said White invested any large sums of money on joint account with said Fletcher, or that he was entitled to any increase, or gains or profits or proceeds on account of any such alleged investment or reinvestments.

IV. This defendant is ignorant whether said Fletcher has in his possession any books of account, deeds, vouchers, & statement, relating to any transactions with said White or his legal representatives, to which the legal representatives of said White have any right, or in which they have any interest, and she is also ignorant
36 whether said Fletcher has any account to render to said complainant or any proceeds of any business transactions, or credits due the estate of said White deceased, which he refuses to disclose or pay over to the complainant, but on information and belief she denies that the allegations of said bill of complaint are true.

And this defendant denies all unlawful combination as charged in said bill and also denies that she has ever concealed or does now conceal important and valuable books, deeds, vouchers and letters from said Fletcher to said intestate alleged to contain valuable information, relating to the estate of said intestate and to his joint transactions and dealings with said Fletcher and said Campbell and she further denies that she has ever delivered to said James Campbell any books or papers whatever relating to the estate of said intestate, or his joint transactions with said Fletcher, and said Campbell, or that she has ever refused to deliver to the said complainant all books and papers of the said intestate in her possession and control.

And this defendant further says that she has been informed and believes that some time about the year 1856 one Thomas Campbell, a brother of this defendant, now deceased and said Fletcher entered into an arrangement with each other, whereby they became the owners of a large tract of pine lands in the County of Alpena and State of Michigan on joint account the title to which land as a matter of security and for convenience stood in the sole name of said Thomas Campbell, but was in fact the property of said Thomas Campbell and said George N. Fletcher, and paid for on joint account, and equally owned by each, and that it was the agreement and understanding of said Thomas Campbell and said Fletcher that they

should enter upon the lumbering business on said land as partners, that before any business in manufacturing lumber was com-
37 menced, to wit, on July 16th, 1857, said Thomas Campbell died near Boston intestate, but on his deathbed and shortly before his decease, the said Thomas Campbell made the following declarations in regard to the disposition of his personal and real estate, in the presence and hearing of the family, of which James Campbell, the wife of said James Campbell, Fanny M. White, now the wife of Albert W. Brown, and this defendant, are the only survivors, that is to say: After all his just debts were paid, his father and mother, both of whom were then living, should have all they wanted during their several lives, that his nephew, the son of a deceased sister, then about four years of age, whose name was Newell Campbell Rogers, whom he intended to bring up as his own son, should have half of the goods and estate remaining after the decease of the father and mother of him, said Thomas Campbell, that the name of said nephew should be changed from the said name of Newell Campbell Rogers, to that of Newell Rogers Campbell, that said William White should be his guardian, that if the said nephew should die without issue, then his share should belong to this defendant, and the other half of his goods and estate was otherwise disposed of, and that the said William White and said James Campbell should hold and manage all the said goods and estate of said Thomas Campbell for the purpose of carrying his wishes into full effect.

And this defendant further says, that she has been informed and believes that all the said lands in Michigan were understood to be held in the name of said Thomas Campbell for the joint account of said Fletcher and the said Thomas Campbell and after his decease in order to carry out the wishes of the said Thomas Campbell as the legal title to said lands of said Thomas Campbell vested in
38 John Campbell his father, said Thomas having died unmarried, and without children, the said John Campbell knowing the facts connected with the transactions of said Thomas Campbell and said Fletcher in the said lands, and intending to carry out the wishes of his deceased son Thomas Campbell, and his obligations and duties, executed a deed of the said lands in said Michigan, one undivided half, to said Fletcher, and the other half to said William White, and said James Campbell, that previous to the execution of said deed, said James Campbell had been appointed administrator of the estate of said Thomas Campbell deceased and said William White, had been appointed guardian of said Newell Rogers Campbell, and that said James Campbell, and said William White were named in said deed as grantees simply because of their respective capacities and that it was not intended nor understood that any title to said lands should vest in them or either of them individually in their own right, but as representing the estate of said Thomas Campbell; that to the best of this defendant's knowledge and belief said White never invested any money or capital of his own in said lands, during his life time and never claimed any personal interest in said lands, but only as guardian of said Newell, and as holding under said deed in trust for said Newell Rogers Campbell.

And this defendant further says that she has no knowledge or information of how much said White may have received from said Fletcher during his life time as proceeds from any sale of said lands or on account of stumpage on the same, but whatever he may have received this defendant is informed and believes should be accounted for by the estate of said William White to the said Newell Rogers Campbell, the former ward of the said William White, and that the estate of said intestate has no right or interest therein.

39 And this defendant denies that any other matter cause or thing in said bill of complaint contained, material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied is true to the knowledge and belief of this defendant.

And this defendant submits that the complainant has not in his bill of complaint, shown any case in equity or case entitling him to proceed against this defendant in this honorable court, and this defendant prays all such benefit as if she had demurred to said bill of complaint.

(Sgd.) ELIZA WHITE.

(On back:) No. 26. In equity. R. H. Spalding, adm'r, *vs.* Geo. N. Fletcher & *al.* Filed July 15, 1874. (Sgd.) Att. G. C. Wilde, clk. Answer of Eliza White. Lyman Mason, att'y for def'ts.

(*Order of Reference.*)

SUFFOLK, *ss:*

Supreme Judicial Court, April Term, 1879. In Equity.

R. H. SPALDING, Adm'r,
vs.
GEORGE N. FLETCHER ET AL.

It is ordered that this cause be referred to Francis W. Hurd, Esquire—as Master to inquire into the matters alleged in

40 the pleadings and state the facts to the Court and take and state the accounts inquired for to the court. And for the better discovery of the matters aforesaid and taking of said accounts the parties are to produce before said Master for his consideration and examination under his direction all deeds books, papers letters and writings in their custody or power relating thereto, and are to be examined thereupon as said Master shall direct and he shall hear all the evidence already taken or which may be hereafter taken in this cause before commissioners and such other evidence as shall be produced before him. And said Master is at liberty to state any special circumstances and make any separate reports as to the matters aforesaid. And any of the parties are at liberty to

apply to this court as they shall be advised for further orders and directions in the cause.

By the Court:

(Signed) JOHN NOBLE, *Clerk.*

Apr. 24, 1879.

(On back:) Equity. No. 26. Spaulding *vs.* Fletcher. Reference to master. Apr. 24/79. Augustus Russ, 26 Pemberton Sq., Boston.

41 (*Report of Master.*)

SUFFOLK, *ss:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING, Administrator,
vs.
GEORGE N. FLETCHER ET AL.

Pursuant to an order of court in the above entitled cause, I, having been attended by the parties and their counsel and having examined the evidence and testimony produced before me upon the matters directed to be inquired into by said order, do report thereof:

1. The parties to this suit are Rufus H. Spalding, Administrator of William White, complainant, and George N. Fletcher, James Campbell and Eliza White, defendants. William White was a resident of Boston and a printer by trade; he died April 28, 1873, and the plaintiff was appointed administrator June 2nd, 1873.

The defendant Fletcher is a resident of Detroit, Michigan, engaged in the lumber business; he formerly resided in Massachusetts and in 1853 removed to Michigan.

The defendant Eliza White is the widow of William White and the defendant Campbell is her brother; William White left one child by a former marriage, who is sole heir-at-law.

2. About the year 1856 one Thomas Campbell, a resident of Boston and who was a brother of the defendant James Campbell and Eliza White, commenced buying land warrants, issued under various acts of Congress which granted unoccupied lands of the United States to soldiers who had served in various wars.

42 The defendant Fletcher had become familiar with the value and location of the unoccupied lands of the United States in Michigan and with the business of locating land warrants; and in 1856 a contract, in writing and under seal, was made between Thomas Campbell and Fletcher, dated March 13th, 1856, of which the following is a copy, together with a memorandum endorsed thereon, dated Jan. 27th, 1857, signed by said Campbell.

EXHIBIT No. 9. G. M. R., Com'r.

Agreement Bet. Thos. Campbell & Geo. N. Fletcher.

Dated March 13, 1856.

"Articles of agreement this day made and entered into by and between Thomas Campbell of Boston, Massachusetts, on the one part and George N. Fletcher, of St. Clair, Michigan, of the second part.

Witnesseth: That the said party of the first part agrees to invest six thousand dollars (and such further sums as he may elect) in pine lands in the vicinity of Thunder Bay River and its tributaries in the State of Michigan on joint account with the said Fletcher and on terms following, to-wit:

The said Campbell to furnish two thousand dollars in land warrants by the first of June next, and the balance thereafter as the lands shall be selected by the party of the second part, and — all monies advanced by either party twelve per cent. per annum shall be allowed on joint account. Said land is to be entered at the United States Land Office in the name of said Campbell as security for monies advanced, and to be held by him on joint account,
43 subject to the terms of this agreement. In consideration of the above, the said Fletcher agrees to give diligent attention to the selection, care and sales of the said lands and shall be allowed to charge to joint account one-half of the expense of the selection of the same, but no charge shall be made by said Fletcher for his own time, services or commissions.

And the said Fletcher further agrees to take said land at the end of three years and to pay the cost of the same and interest thereon at the rate of twelve per cent. per annum, provided the said Campbell shall so elect, by said Campbell giving six months' notice of his wish in writing. No other entries of land shall be made or interest taken or held in any other entries by either party in said region, until the full amount as named above is located.

And it is further agreed that if the said parties shall desire to enter into a partnership for the manufacture of lumber, they shall have the preference over all others.

The proceeds of the first sales of any lands shall be appropriated to the payment of the capital invested & interest thereon. And it is agreed that the joint account herein mentioned shall be closed up in three years from the date hereof unless otherwise agreed upon by the parties, and the net profits of the concern shall be divided equally between the parties.

In Witness Whereof, We have hereunto set our hands and seals at Boston in Massachusetts this thirteenth day of March, 1856.

THOMAS CAMPBELL. [s.]
GEORGE N. FLETCHER. [s.]

Witness:
JAMES CAMPBELL.

BOSTON, *January* 27, 1857."

"The amount of land purchased in the name of Thomas Campbell under the foregoing contract amounts to fifteen thousand eight hundred & fourteen acres. Nine hundred and eight acres of which belongs to E. A. Brackenridge and J. K. Lockwood as per
44 contract between them & Geo. N .Fletcher being the expense of selecting 4541 acres of the foregoing 15,814 acres. The amount of cash furnished by said Campbell for purchase of said lands is sixteen thousand four hundred and thirty nine dollars 53/100, interest on which under the terms of the foregoing contract is to date from August 1, 1856.

The whole amount of expenses of selection paid by Geo. N. Fletcher is seven hundred seventy-eight dollars fifty-four cents (758.54) one half of which he is to charge to joint account."

"The above statement is correct,

THOMAS CAMPBELL."

3. The said Thomas Campbell died July 16th, 1857, intestate and unmarried, leaving his father, John Campbell, sole heir-at-law and the defendant James Campbell was appointed administrator of his estate. At the time of Thomas Campbell's death there were standing in his name 15,814 acres of pine lands in Michigan which had been located by Fletcher under land warrants bought by Thomas Campbell under the aforesaid contract of March 13th, 1856. The warrants had cost Campbell $16,439.53 as recited in the aforesaid memorandum. No lands had been sold or lumber operations begun under the agreement of March 13th, 1856, at the time of Thomas Campbell's death.

4. Thomas Campbell died indebted to William White for money loaned by White which had been invested by Campbell in the aforesaid land warrants. The amount of this indebtedness was disputed by the parties to this suit. By the Probate account of the defendant Campbell, which was filed and allowed in the Probate Court for Suffolk County on the 21st day of November, 1859, it was $17,438.67 and said administrator was allowed payment thereof in two items of said account described therein as "cash paid William White
45 $8,438.67," and "acceptance of George N. Fletcher passed to William White as cash on debt due him $9,000.00." I find that said Probate account sets out the amount of said indebtedness correctly and truly, and that Thomas Campbell on said 21st day of November owed William White the sum of $17,438.67.

5. That portion of the indebtedness of Thomas Campbell to White, described in said Probate account as "cash paid William White, $8,438.67," was not paid to White in cash but by one-fourth interest in the Thomas Campbell lands, and by a note of John Campbell for $958.67. By deed, dated December 10th, 1859, John Campbell, the sole heir-at-law of Thomas Campbell conveyed to Geo. N. Fletcher, James Campbell and William White, desc-ibed in said deed as "co-partners known under the firm of the Thunder Bay Lumber Company," real estate mentioned in pargraph 3 of this report

standing in the name of Thomas Campbell at his decease. The interest conveyed to White by said deed of John Campbell, together with the said note of $958.67 constituted what was described in the Probate account as "cash paid William White $8,438.67."

6. The amount due from Fletcher to Thomas Campbell under the contract, dated March 13th, 1856, mentioned in paragraph 2 of this report, was computed by Fletcher, James Campbell and White, with interest at twelve per cent., and agreed upon by them to be $10,031.37 and was paid by Fletcher to James Campbell, administrator, by a note for $1,031.37 ultimately paid in cash, and a writing described in said administrator's account as "one acceptance of Geo. N. Fletcher, dated June 1, 1858, accepted by William White, January 26, 1859, $9,000."

7. The original of said $9,000 written obligation was never produced before me. The defendant Fletcher produced in writing a copy of which, with the endorsements thereon, is as follows:

46 EXHIBIT 2. G. M. R., Com'r.

$9,000 *Obligation.*

BOSTON, *June* 1, 1868.

"There is due the estate of Thomas Campbell the sum of nine thousand dollars on the settlement this day being my half of the pine lands this day entered in his name one-half of which is to be deeded to me & I agree to pay the same on demand with interest.

9,000*0*.00.

GEO. N. FLETCHER."

(Endorsed on back.)

(In pencil:) 26.

1500.	
1600.	
1545.48	10,695.99
5000.	2,904.17
9645.48	7,791.82."

Mar. 1, '59. Paid Fifteen Hundred.
Mar. 18/59. Rec'd one thousand dollars 1000.
June 1861. Rec. Fifteen Hundred forty five 48/1000 dollars.
June 15/63, rec. Five thousand dollars."

The paper produced before me I find is not the original, and the exact tenor of the original writing cannot be determined upon the evidence before me. I find that the original was an acknowledgement of indebtedness from Fletcher to the administrator of Thomas Campbell of the sum of $9,000, that the original paper after being

47 passed from Fletcher to the administrator of Thomas Campbell, was passed by said administrator to said White, with the knowledge of Fletcher, and accepted by White in satisfaction of $9,000 of his claim against the estate of Thomas Campbell.

The aforesaid endorsements upon the paper produced before me, were all in the handwriting of the defendant Fletcher and I find that each and all of said endorsements are false and fictitious as representing payments of said Fletcher's indebtedness of $9,000.

8. Besides the interest which the defendant Fletcher had in lands under the contract of March 13th, 1856, and the deed of John Campbell aforesaid, he was also, in and before 1859, the owner of one undivided half of about 450 acres of land situated on both sides of Thunder Bay River, Michigan, and which now is part of the City of Alpena. These lands Fletcher first held as a tenant in common with one Lockwood and Oldfield. Partition was made of said lands in October 1865 and one half was conveyed to the defendant Fletcher in severalty.

These lands were called lands at the Mouth of the River, also the Bailey and Lockwood and Minor purchase.

In January, 1859, while Fletcher was owner as tenant in common of one half of the land at the Mouth of the River, he made a written contract, dated Sept. 1, 1858, with said White and James Campbell, of which the following is a copy:

EXHIBIT No. 1. G. M. R., Com'r.

Thunder Bay Lumber Company Contract.

"Articles of agreement this day made and entered into by and between George N. Fletcher of St. Clair, Michigan, on the one
48 part and James Campbell, of Burlington, and William White of Boston, both in the Commonwealth of Massachusetts, of the other part.

Witnesseth that the said parties mutually agree to form and do by these presents form themselves into a company for the purpose of manufacturing lumber at the mouth of Thunder Bay River in the town of Fremont and State of Michigan, to be called the *'Thunder Bay Lumber Company'* with a capital stock of sixty six thousand (66,000) dollars fully paid in, in manner and form as hereinafter described: one half or thirty three thousand (33,000) dollars by George N. Fletcher and thirty three thousand (33,000) dollars in equal parts by James Campbell and William White as follows, viz.: By the said Fletcher fifteen thousand dollars being his portion of fifteen thousand eight hundred and fourteen acres of pine lands now standing in the name of Thomas Campbell in the State of Michigan, and eighteen thousand (18,000) dollars being one undivided half of the Bailey and Lockwood and Minor purchases, so called, of lands at the Mouth of Thunder Bay River in said State, and thirty three thousand (33,000) dollars by James Campbell and William White

15,000 in the lands being the balance of the interest of the late Thomas Campbell in all the lands now standing in his name, situated as aforesaid, and the balance 18,000 in cash.

It is understood and agreed that all profits and losses of the said Company, shall be mutually and equally divided between the said Fletcher on the one part, and James Campbell and William White on the other part, and it is further agreed, for the purpose of building a mill and carrying on the business of manufacturing lumber, that the said parties, shall furnish such amount of capital as may be deemed advisable, one half by the said Fletcher, and one-half by the said Campbell and White, and if either party shall at any time
49 furnish more than his proportional amount, then the said company shall pay interest for the same at the rate of seven per cent. per annum.

It is further agreed that the time of either party when devoted to the special interests of the company shall be allowed such compensation for his services as may be hereafter agreed upon.

GEO. N. FLETCHER.
WILLIAM WHITE.
JAMES CAMPBELL.

Witness:
H. W. HARRINGTON.

Boston, Sept. 1, 1858."

(Backed:) "Thunder Bay Lumber Co. Agreement" (in pencil). "Never acted on" (in ink). "It may be necessary to show this as our intentions" "White" (in pencil).

I find that the words in ink, "Never acted on," and the words in pencil "It may be necessary to show this as our intentions" and "White" endorsed on the copy of said agreement produced, are in the handwriting of the defendant Fletcher.

I find that James Campbell never acted upon and made no payment under this contract. William White passed over and delivered to the defendant Fletcher the aforesaid $9,000 obligation, which was received by Fletcher as payment by said White for one-half interest in the Mouth of the River Lands, under said agreement. No written evidence of White's interest in the mouth of the river lands signed by Fletcher other than said agreement, dated Sept. 1, 1858, was produced before me, except a letter, dated Detroit, Feb. 14, 1860, written and sent by Fletcher to one W. A. Righter, a copy of which is annexed to this report marked "A," and a letter to one W. H. Emerson, without date, written and sent by said Fletcher, on or about May 4, 1859, a copy whereof is annexed marked "B," and two ac-
50 counts, signed and rendered by said Fletcher, copies whereof are annexed, marked "C" and "D."

The lands at the mouth of the river, referred to in said letters and in one part of the aforesaid contract, are the same lands described in a deed of Erastus Bailey to George N. Fletcher and James K. Lockwood, dated Nov. 21, 1855, and in an agreement, bond and deed,

dated respectively Jan. 12th and 15th, 1857, and April 11, 1859, copies thereof are hereto annexed, marked "E," "F," "G," "H."

The first item of the account marked "C" refers to expenditures respecting the lands at the mouth of the river hereinbefore referred to, Oldfield, Minor and Lockwood being joint owners thereof with Fletcher until October, 1865.

The Water Power Company mentioned in the second item of the account marked "D" refers to an account on the defendant Fletcher's ledger there called "Thunder Bay Water Power Co.," to which items of expenditure respecting said lands at the mouth of the river were charged. Said account is contained on defendant's Ledger 1, pages 560 and 583.

9. After said agreement, dated Sept. 1, 1858, was executed the management of the aforesaid lands of the expenditures thereon and therefor, including the advances made by the intestate White, was intrusted to the defendant Fletcher, who made improvements upon the mouth of the river lands, and opened an account on his ledger under the name of Thunder Bay Lumber Co., the first entry of which is under date of April 1, 1859, and from that date until the death of White one-half of the disbursements on account of said lands was charged to White. There were also accounts of lands conveyed by the deed of John Campbell and various settlements were had between Fletcher and White. The total amount of
51 White's side of the account, representing cash advanced by him to Fletcher and interest thereon, up to July 13, 1861, was $11,558.55, in addition to said $9,000 obligation. Since the death of White there has been no account rendered by Fletcher. Stumpage and lumber have been disposed of by said Fletcher from said lands and portions of the lands at the mouth of the river sold and money received by said Fletcher, of which the plaintiff is entitled to an account if the court shall rule, upon facts stated in this report that Fletcher is liable to the plaintiff.

10. The defendant Fletcher produced numerous books and papers, including ledgers and journals. These books exhibit upon inspection evidence of alterations, erasures and mutilations of entries touching transactions between Fletcher and said White respecting said lands. I have not taken it to be my duty to incorporate into this report the details of said alterations, erasures and mutilations, but I find that said books contained an account in which the debit side represents the cost to said Fletcher of the mouth of the river lands, and said account originally contained a credit of $9,000, representing the receipt by said Fletcher from said White of the aforesaid obligation for the interest in said lands. This entry and numerous others have been erased, altered and mutilated by said Fletcher since White's decease to conceal the receipt by Fletcher from White of said obligation and its application by Fletcher to the credit of the aforesaid lands. Said books also contain many alterations, erasures and mutilations made by said Fletcher since White's decease to represent the discharge and extinguishment of said $9,000 obligation by payments as endorsed upon the paper referred to in paragraph 7 of this

report, and other alterations which I do not deem material to be reported.

11. I find that no declaration was ever made by Thomas Campbell, or trust created for the benefit of Newell Rogers Campbell, as alleged in the defendant's answer, touching the mouth of the river lands or the lands mentioned in this report as conveyed to White.

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12. I find that the defendant James Campbell had no beneficial interest in the aforesaid lands other than appears upon the facts stated in this report.

13. The defendants combined and confederated together to conceal, and did conceal, from and misrepresent to the plaintiff transactions between defendant Fletcher and said White respecting said lands and matters connected therewith.

14. There was no evidence before me that said White ever requested said Fletcher to convey to him any interest in said lands at the mouth of the river.

15. All questions of law arising from the facts stated in this report are reserved for the ruling of the Court; and by consent of parties this report does not contain any statement of account between the parties, it being agreed to present to the Court the preliminary question of the Defendant's liability to the plaintiff.

16. Certain papers were put into the case, which, in the opinion of the defendant Fletcher and his counsel, have an important bearing upon the amount of interest, if any, which White had at the time of his death in the Mouth of the River Lands, so called.

These papers are omitted from the report by consent of both parties, and it is agreed by them that nothing contained in said report shall conclude them upon the question of the amount of said White's interest, and of the accounting, if any, but that all such questions are to be referred back to the Master, the proportion or shares of said White's interest in the Mouth of the River Lands to be determined solely upon the testimony heretofore taken and put in before the Master, whether by deposition or by oral testimony, steno-

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graphically reported and written out and in the possession of the Master, in case the Court should decide that the plaintiff is entitled to any interest in respect to the Mouth of the River Lands.

17. It is further agreed that the Statute of Frauds of Michigan, and all decisions which either party may wish to cite bearing upon the construction thereof shall be considered to be a part of this report.

The text of said statute is agreed (subject to correction to be as follows):

Compiled Laws of Michigan of 1857.

Chap. 104, Sec. 6, 8, 9 and 10.

(3177) Sec. 6. No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter

be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

(3179) SEC. 8. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized by writing.

(3180) SEC. 9. The consideration of any contract or agreement required by the provisions of this chapter to be in writing, need not be set forth in the contract or agreement, or in the note or memorandum thereof, but may be proved by any other legal evidence.

54 (3181.) SEC. 10. Nothing in this chapter contained shall be construed to abridge the powers of the Court of Chancery to compel the specific performance of agreements, in cases of part performance of such agreements.

The above sections are repeated verbatim in Compiled Laws of 1871, chap. 166 (4692) Sec. 6, (4694) Sec. 8, (4695) Sec. 9, (4696) Sec. 10, and there appears to be no subsequent amendment or change.

Compiled Laws of 1871 contain the following:

Chap. 168, (4714) Sec. 2 (Howell, Sec. 6204 of 1882):

Every grant or assignment of any existing trust in lands, goods or things in action, unless the same shall be in writing and signed by the party making the same, or by his agent lawfully authorized, shall be void.

This agreement is made without prejudice to right of the defendant to ask the court to order a report of the evidence bearing upon the ownership and disposition of the $9,000 obligation or other evidence.

FRANCIS W. HURD.

A.

EXHIBIT 331. G. M. R., Com'r.

DETROIT, *Feb'y* 14, 1860.

W. A. Righter, Esq.

DR. SIR: To day I rec'd a letter from my partner Mr.
55 White who called on you last week and from his remarks I venture to write you at this time, I have long been aware that certain parties interested at Alpena have seen fit to say much in disparagement of our plans and operations up there, We who own pine lands on that river are interested to learn the best plans for manufacturing the same, and whether it shall be sawed at the mouth of the river where it can be shipped from the mill dock or at the upper rapids when it must be brought down by railroad, it only

remains to be seen at which place it can be done the cheapest. And as I am largely interested at the mouth of the river, I believe and try to show to others that mine is the best, and can only say that if any one is disposed to spend 50 or 100,000 $ in building railroads from the upper rapids I for one am willing as it must add to my interest in some measure at the mouth. Mr. White said you would like to get a piece on ¼ of the interest at the mouth, two years since I sold Mr. White ¼ for 9,000 $ and did it simply because he owned with me 16,000 acres of pine land up the river but I would not sell the balance for twice that sum. But as I have had to carry forward most of the improvements there some of the other owners not yet being ready to operate I find it rather hard and am inclined to get in some other partners that will carry forward their share.

A year since I had an offer which I carried to Mr. Trowbridge for 12,500 $ for ¼ but while Mr. T. was getting ready to take it the other party backed down but owing to hard times etc. I now think I can get that offer again including interest and I give you below some of the figures and I would prefer that you should not make it public and should you be inclined to take hold of the thing I would at once set myself at work to find the best terms.

56 The amount of my first purchase was for time 500 acres lying both sides of the streams 30 $ per acre 4 years since, of which I took one half and then sold White ½ of mine. I then made a purchase of four acres more, comprising the lower rapids for which I paid 3000 $ this gave us full power on the river for a mile or more from the mouth.

Now to pay for ¼ of the whole say 12,500 will not be so much above what Mr. White paid for his two years since at the rate of money West. We propose to build the dam and canal which will cost finished say 15,000 with building, clearing &c. and also a pier out from the mouth to improve the channel some 1,500 ft. which will be valuable for mills say 2,000.00 which will make the total cost of ¼, 17,000 of this 2,000 $ could remain on mortgage on first purchase and no doubt time would be given on a good share of the balance. We have sold 400 ft. river front for a steam mill for $4,000 and some 3,000 $ in village lots all on time which would lessen your purchase when paid. There is already taken up over 200,000 acres of pine land which must come out at the mouth of that river, say that it will average 10 M pr. acre ½ what you have guaranteed to you and we have 2,000 million feet which will take 25 mills of large capacity twenty years to use up, half of which we can reasonably expect will be located on our land, this will improve all we have below the dam. We have fixed our price at $10 pr. river foot and think it low, and that it is cheaper than to take a site on the upper rapids for nothing for we are ready to offer any one a good mill site at one half the extra cost in shipping lumber from our place and the upper rapids. And now to show what you are getting for the 17,000. We have from the dam to the end of the pier on both sides of the river 10,000 feet of land suitable for water and steam mills. We have about 1,000

57 Village lots which are now selling from 25 to 150 $ per lot. Also some 200 acres not laid out into lots and some 40

acres of Pond for boom, and then you have the value of the water power which is estimated to be worth 50 cts. to 1.00 per M ft. for sawing over steam. And I have no doubt but that we can have power enough there to saw 40-Millions a season.

In time this must prove a great investment. And I have given you these items in good faith for your own personal — and trust you will use them only for my good.

All of which I humbly submit

Yours most truly,

GEO. N. FLETCHER.

P. S.—Respecting our former correspondence I can only say when you are prepared to accept of an offer to lumber and saw, I shall be prepared to make it with good guarantee for its fulfillment, and had I the minutes of your lands would take pains to examine them thereto.

EXHIBIT C. C. C. J. M., Com'r.

Mr. Emerson.

SIR: My proposition to you was to sell you one undivided fourth part of the property now owned by the Thunder Bay Lumber Co., that is, one undivided half of the Bailey purchase of some 450 acres at the mouth of the River and 16,000 acres of Pine Lands above for the sum of 25,000 $, this was exclusive of the improvements made but if you are still desirous of taking hold with us we will include the improvements up to the time the accounts were made up in December, amounting to 8,500 $. In order that you may see the thing in all its bearing I give you a statement of the present value of the property, what we are now asking for it, and I see no reason why
58 we may not get 15 or 20 $ pr. Foot ten years hence as well as 10 $ now for it.

Value of the Village Property.

7,500 feet River front below the dam at 10 pr. foot.....	$75,000
3,000 feet of piers to be built, over and above cost of building	10,000
800 Village Lots say $25.....	20,000
100 acres of Land not laid out in the plot say 10.....	1,000
An island on the River sufficient for 2 good mills say.....	8,000
	$114,000
Add to this a yearly income for the use of the water to run say 4 mills, to cut 40 millions annually and very probably twice that, $20,000 from this we must take for improvements yet to be made.....	14,000
The actual value.....	$100,000

Besides the annual income of 20,00 which is the interest on 120,000 more.

In making these figures, I do it from actual propositions and from experience of what it costs.

To get 1,000 feet of logs to the mill	$2.50
To saw 1,000 feet of logs at our water mill	1.50
Cost of 1,000 feet standing allowing 5,000 per acre	1.00
Cost of lumber on dock	$5.00
And for use of Mill	.50
	$5.50

the usual price of lumber has been 11 to 12 p. m. at the mill including all kinds this would give 5½ profit.

Now if on the 4,000 acres you show there is 5 m. pr. acre
59 at the lowest figure would be 20 millions but more likely 30 million then it would give 100,000 profit on the land part alone leaving your land on hand still and this is after paying the first cost.

Now to show that I allow enough for the use of the mill, one mill to cut 10 millions will cost us including site and all say $20,000, this would pay us on its cost 25% which I am sure is enough.

When I get back to Boston I will send you some duplicate maps.

Now I would have you understand that I do not say that these figures will cover all contingencies but I think they will more than do it and if I was called upon I should say that I fully believed the profits will go even beyond.

We have decided not to give any parties here an offer except for mill sites at 10 pr. foot for steam & the same for water with a yearly rent.

I shall want you to give me your answer as soon as you can conveniently as of course I do not want such an offer to be made public.

Yours, GEO. N. FLETCHER.

C.

EXHIBIT 120. G. M. R., Com'r.

(In pencil:) ¼ of expenses up to this date.

Messrs. White & Campbell, in a/c with Geo. N. Fletcher, Dr.

1860.		
Jan'y 27.	To one half of the amount expended at Alpena as pr. Settlement made with Oldfield, Miner & Lockwood June 9, 1859	2,257.34
60	Paid D. Carter board of self, White & Campbell & going to Island June 1858	12.75
	¼ Expenses of G. N. F. to B. New York	31.63
	¼ " with White to New York	9.25
	¼ " 3 weeks' board in Boston	7.50
	Paid getting up maps	3.25
	G. N. F. Expenses to Alpena June 1859	5.00
	¼ amt. paid A. Cole getting out 196 M. pine	196.00

½ amt. paid E. A. B.	21.80
½ expense of G. N. F. to Lansing to settle taxes..	6.66
½ expenses of G. N. F. to Boston in May.....	34.75
½ taxes paid at Alpena for 1858.....	31.86
½ " " " Lansing, 1857 & 1858.....	46.37
½ Expenses to Pt. Huron, Dunville, Apl. 8-59...	8.00
½ Expenses Lansing to cancel taxes on Warrants	7.85
½ telegraph to Boston.....	.75
½ Expense to Pt. Huron to meet Oldfield, M. & L. Dec. 28.....	3.11
Interest on the above to date.....	218.28
	$2,905.17

Settled E. E. Jan'y 27, 1860, by allowed in White ac. against me.
GEO. N. FLETCHER.

Memo. W. W. ac. was.....	10,315.73
Int. on same.....	380.26
	10,695.99

(Backed:) Act No. 1. Settlement. Jan., 1860.

61 D.

EXHIBIT 3. G. M. R., Com'r.

Wm. White in ac. with Geo. N. Fletcher, Dr.

1859.			Inter't.
Oct. 1.	To ½ Amt. paid J. Colo on Mill frame....	133.87	1,250.00
July 1.	To ½ Amt. paid Water Power Co. to Jay 1860	101.00	840.75
Oct. 1.	To ½ of taxes 1859.....	2.39	22.45
	To pd. Capt. Malden.....	.....	1.12
1860.			
April 1.	½ of taxes paid 1859.....	3.84	37.42
	To my notes 1050, 1200, 500, 750, interest adjusted in White a/c.....	33	3,500.00
	½ of taxes on land 1860.....	.....	14.86
June 15.	D'ft on Kendrick.....	.....	230.00
Aug't 11.	Dft. on N. York.....	.....	1,800.00
20.	Do	.....	1,000.00
June 12.	Do. Hardwick.....	.....	300.00
	Error in ch-rging me dis' on Notes.....	.....	40.00
	Interest on this a/c to July 13/61.....	241.43	241.43
			9,328.04

CR.

By your a/c rendered to date.....	7,782.56
Bal. endorsed on my note.....	1,545.48

62 Settled E. E.

GEO. N. FLETCHER.

The question of logs got off by Cole is still left open, the a/c to be made up hereafter.

GEO. N. FLETCHER.

(In pencil:)
July 13, 1861.
2,151.75
14.86
241.43

½)2,408.01

1,204.00

(Backed:) A/c No. 2. Feb., 1861. 1859. (In pencil:) W. W. I got of J. C.

E.

SPALDING
v.
FLETCHER.

Sept. 27, 1883.

F. W. H.

This Indenture made and entered into this twenty-first day of November in the year of our Lord one thousand eight hundred and fifty-five between Erastus Bailey of the Town of Wheeling Cook County Illinois and his wife party of the first part and James K. Lockwood of Port Huron St. Clair County Michigan and George N. Fletcher of St. Clair in the same County and State of Michigan parties of the second part.

Witnesseth, that the said party of the first part for and in consideration of the sum of thirteen thousand eight hundred and seventy five dollars paid by the said party of the second part the re-
63 ceipt of which is hereby acknowledged do by these presents grant, bargain, and sell unto the said party of the second part their heirs and assigns All those certain tracts and parcels of land situated in, All and each of them in Alpena County Michigan, at & near the Mouth of Thunder Bay River in said County known and described as follows to wit,

The north west fractional quarter of section No. twenty six (26) containing one and 58-100 acres:

The fraction of the South west quarter of Section (23) lying South of said river containing two 13-100 acres:

Lot number four (4) Section No. (23) containing 56 acres:

Also lots Nos. 3, 4, 5, 6, 7, 8 & 9 in Section twenty two (22) containing respectively in orders named 50 76-100 acres, 37 26-100 acres; 42 84-100 acres 34 29-100 acres; 19 76-100 acres, 35 50-100 acres; and 58 77-100 acres jointly 279 12-100 acres.

Also lots No. one containing 65 acres and
Lot No. Two containing 39 24-100 acres in Section No. (15).
Also fractional 1-4 q. N. W. 1-4 Sec. (22) lying West of said river or 19 50-100 acres.
All in Town (31) N. Range (8) East all 462 7-100 acres more or less.

Together with all and singular the hereditaments and appurtenances thereunto belonging and in any wise appertaining to have and to hold the said premises as above described with the appurtenances unto the said party of the second part, their heirs and assigns forever.

And the said party of the first part for themselves and heirs, executors and administrators do hereby covenant to and with the said party of the second part their heirs, and assigns that they are well seized of the premises above conveyed as of a good and in-
64 defeasible estate in fee simple and have good right to sell and convey the same in manner and form as aforesaid, that the said premises are free from all incumbrances and that the above bargained premises—in the quiet and peaceable possession of the said party of the second part their heirs and assigns against the claim of all persons whomsoever he will forever warrant and defend.

In testimony whereof, the said —— —— has hereunto set hand and seal the day and year first above written.

CHARLOTTE BAILEY. [L. S.]
ERASTUS BAILEY. [L. S.]

The word & figure (6) in the number of Section named above written partly on an erasure before execution also word aforesaid erased or crossed out before execution.

Signed, sealed and delivered in presence of—
M. F. MATHER,
GEORGE W. CLARKE,
Witness to E. Bailey Signature, &c.

STATE OF ILLINOIS, *Cook County, ss:*

I, Calvin W. Wolf a Justice of the Peace for said County do certify that on this day appeared before me Erastus Bailey whose name appears signed to the foregoing deed of conveyance and who is personally known to me to be the identical person whose name is subscribed to said deed as having executed the same as his voluntary act and deed for the uses and purposes therein mentioned and expressed.

65 Given under my hand and seal at Chicago this twenty first day of November eighteen hundred and fifty five.

CALVIN D. WOLF, [SEAL.]
Justice of the Peace.

STATE OF ILLINOIS, *Cook County, ss:*

I, John M. Schafer a Justice of the Peace in and for said County in the State aforesaid do hereby certify that Charlotte Bailey wife of the said E. Bailey personally known to me to be the same person

whose name is subscribed to the foregoing deed appeared before me this day in person and acknowledged that she signed the same as her free and voluntary act for uses and purposes therein set forth.

Given under my hand and seal the 24th day of November at — this 1855.

JOHN M. SCHAFER, *J. P.* [SEAL.]

STATE OF ILLINOIS, *Cook County, ss:*

I John M. Schafer a Justice of the Peace in and for the County and State aforesaid do hereby certify that Charlotte Bailey wife of Erastus Bailey one of the persons named and described as Grantor in the within deed who is also personally known to me appeared before me this day in person and having been by me examined separate and apart and out of the hearing of her said husband and the contents and meaning of the said deed or instrument in writing having been by me fully made known and explained to her acknowledged that she had freely and voluntarily executed the same and relinquished her dower and all right and interest in and to the lands and tenements therein mentioned without compulsion of her said husband and that she does not wish to retract the same.

Given under my hand & official seal this 24th day of November A. D. 1855.

JOHN M. SCHAFER, *J. P.* [SEAL.]

66 STATE OF ILLINOIS, *Cook County, ss:*

I, Charles B. Farwell, Clerk of the County Court of the said County do hereby certify that John M. Schafer, Esquire, whose name is subscribed to the Proof of acknowledgement of the annexed instrument in writing was at the time of taking such proofs or acknowledgement a Justice of the Peace in said County duly commissioned sworn and acting as such and authorized to take the same and further that I am well acquainted with his hand writing and verily believe that the signature to the said Proof or acknowledgement is genuine and further that the annexed instrument — executed and acknowledged according to the laws of the State of Illinois.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at the City of Chicago in said County the 4th day of December, A. D. 1855.

[SEAL.] C. B. FARWELL, *Clerk.*

STATE OF ILLINOIS, *County of Cook, ss:*

I, Charles B. Farwell, Clerk of the County Court of said County do hereby certify that Calvin Wolf, Esquire, whose name is subscribed to the proof or acknowledgement is a Justice of the Peace in said County duly commissioned sworn and acting as such and authorized to take the same: and further that I am well acquainted with his hand writing and verily believe that the signature to the said proof or acknowledgement is genuine; and further that the

annexed instrument is executed and acknowledged according to the laws of the State of Illinois.

67 In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Chicago in said County the 21st day of November, A. D. 1855.

[SEAL.] C. B. FARWELL, *Clerk.*

STATE OF MICHIGAN. *County of Alpena, ss:*

I hereby certify that the foregoing is a true transcript compared by me with the original, in my office, and recorded in Liber 1 of deeds on page 454 in Alpena County Records, and of the whole of said original record.

Witness my hand and seal.

[SEAL.] ALEX. McDONALD,
Register of Deeds.

Alpena, Mich., Feb'y 12th, 1880.

(Backed:) Erastus Bailey & Wife to Lockwood & Fletcher. Warranty deed. Received for record the 23rd day of August, A. D. 1872, at 5 o'clock p. m. Alex. McDonald, register.

F.

EXHIBIT H. J. M., Com'r.

DETROIT, *Jan'y 12th*, 1857.

In consideration of the sum of one thousand five hundred Dollars to be paid as follows to wit:

One third down ($500) and balance in two annual payments with interest I have and do hereby sell as agent and joint owner with Chisholm & Minor to George N. Fletcher one undivided half of a certain piece or parcel of land lying in the County of Alpena &

State of Michigan being the South part of Fraction one in

68 Section Fifteen in Town Eight East North of Range Thirty-one and more particularly described as the lower fraction of the Eldred purchase made by said parties above named and embracing the water power and Falls of the Thunder Bay River and the said Fletcher agrees to pay the Five Hundred Dollars down and execute notes for the other payments as soon as a formal contract shall be made out and forwarded to him by post.

And the undersigned agrees to make such bond for a deed within thirty days.

J. K. LOCKWOOD,
For Himself and Chisholm & Minor.
GEO N. FLETCHER.

N. B.—John Oldfield is understood by his agent G. N. Fletcher to have purchased one undivided quarter of the above piece of land at the same price and terms, to wit, $750, for 1 quarter.

J. K. LOCKWOOD.

(Backed:) J. K. Lockwood. Bond for fraction.

G.

EXHIBIT G. J. M., Com'r.

Articles of agreement, made and concluded this Fifteenth day of January in the year of our Lord one thousand eight hundred and fifty seven between William O. Chisholm, John S. Minor and J. K. Lockwood of the first part, and George N. Fletcher of the second part,

Witnesseth:

Article 1st. The said parties of the first part, hereby agree to sell the said party of the second part, who hereby agrees to pur-
69 chase the following described lot of land, situated in the County of Alpena in the State of Michigan, to wit: The undivided one half of that part of the South East Fractional quarter of the South West Fractional quarter of Section Fifteen lying South of the Thunder Bay River in Town thirty one North of Range Eight East.

For the sum of one thousand five hundred dollars to be paid as follows, Five Hundred Dollars Down on the delivery of this Bond and Five Hundred Dollars annually with interest for two years.

Article 2d. The party of the second part does in consideration thereof, agrees to pay to the said parties of the first part the Sum of One thousand five hundred dollars as above mentioned by paying five hundred dollars down and executing two promissory notes of even date herewith payable in one and two years with interest.

Article 3d. The said party of the second part agrees to pay all taxes and assessments which shall be imposed on the said land from the date hereof.

Article 4th. In consideration whereof, the said parties of the first part, covenants and agrees to and with said party of the second part, his heirs, executors, administrators or assigns, on payment of the purchase money and interest, in manner aforesaid, and the fulfillment of the aforesaid covenants, well and truly to convey to the said party of the second part, his heirs or assigns, the above described premises.

Article 5th. And it is the expressed agreement and understanding of the contracting parties to these presents, that if the said party of the second part shall fail in the performance of any of the covenants on his part to be performed by these articles, then and in such cases, the said parties of the first part shall, at their option, be, and they are hereby discharged and acquitted from making
70 the conveyance aforesaid, and from all claims of the party of the second part; and it shall and may be lawful for the parties of the first part to re-enter upon said premises, at any time after such default, and the party of the second part, and all persons claiming under him shall thenceforth be deemed mere tenants at will under the parties of the first part, and be liable to be proceeded against and turned out of possession, without notice to quit.

And the parties of the first part shall, in case of such default,

be at liberty to sell such land to any person or persons whomsoever, without being in any manner liable in Law or Equity, for any damages in consequence of such sale, or to return any payment made on account of this contract.

And the said parties of the first part shall have a right to recover all damages sustained by reason of any unnecessary destruction of timber growing on said land, or any waste, or by the holding over the party of the second part or any person or persons under him without permission.

In witness whereof, the said parties have hereunto interchangeably set their hands and seals on the day and year first above written.

WM. A. CHISHOLM,
By his Attorney, J. S. MINOR.
J. S. MINOR.
J. K. LOCKWOOD.

Signed sealed and delivered in presence of
SALMON MINOR.
E. A. BRACKENRIDGE.

(Backed:) Chisholm, Minor & Lockwood. Bond.

71

H.

EXHIBIT I. J. M., Com'r.

This Indenture, made the eleventh day of April, in the year of our Lord one thousand eight hundred and fifty nine, between James K. Lockwood of the County of St. Clair in the State of Michigan of the first part and George N. Fletcher of the County and State aforesaid of the second part.

Witnesseth, that the said party of the first part, for and in consideration of the sum of one thousand five hundred dollars to him in hand paid, by the said party of the second part the receipt whereof is hereby confessed and ackno[illegible]edged, does by these presents, grant, bargain, sell, remise, releas[illegible]d forever quitclaim unto the said party of the second part and to his heirs and assigns forever.

The one undivided half of the following described lands, to wit: The South East Fraction of the South West Fractional quarter of Section Fifteen in Township number thirty one North of Range Eight East in the District of Lands subject to sale at Genesee, Michigan containing five acres and four hundredths of an acre more or less according to the Survey of the United States as per Patent to Ansen Eldred dated July 1st, 1848, and more particularly known as the Water Power fraction on the Thunder Bay River in the County of Alpena in the State of Michigan.

Together, with all and singular, the hereditements and appurtenances thereunto belonging, or in any wise appertaining to have and to hold the said premises above described to the said party of the second part, and to his heirs and assigns, to the sole and only proper

use, benefit and behoof of the said party of the second part, his heirs, and assigns, forever.

72 In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

J. K. LOCKWOOD. [L. S.]

Signed, sealed and delivered in the presence of
J. S. MINOR.
SAM'L H. EELLS.

Whereas, my wife Eliza E. Lockwood is now ill and cannot execute a deed therefore I agree and bind myself in case of her recovery to have her execute a release of dower to the above described premises to the above mentioned grantees.

J. K. LOCKWOOD.

SAM'L H. EELLS.

STATE OF MICHIGAN, *County of St. Clair, ss:*

On this twelfth day of April one thousand eight hundred and fifty nine before me, a Justice of the Peace in and for said County, personaly came the above named James K. Lockwood known to me to be the person who executed the foregoing instrument, and acknowledged the same to be his free act and deed.

A. A. CAMTON,
Justice of the Peace.

Know all men by these presents, that Eliza E. Lockwood, wife of the within named James K. Lockwood in consideration of the sum of Ten Dollars to her in hand paid by the within Geo. N. Fletcher at or before the execution of these presents, the receipt whereof &c., and for divers other good causes and considerations, here thereunto moving hath remised, released & forever quitclaimed & by these presents doth for herself, her heirs, executors & administrators remise, release & forever quitclaim unto the said Geo. N. Fletcher his heirs, & assigns all the dower & right & title of dower & all

73 other the estate, right, title, interest, claim & demand whatsoever both at law & in equity of her the said Eliza E. Lockwood which she now hath or which she, her heirs, executors or administrators can or may at any time hereafter have claim or demand of in to or out of all & singular the said lands, premises by the within indenture conveyed or mentioned or intended so to be or their appurtenances or any part thereof so that she the said Eliza E. Lockwood her heirs, executors & administrators or any of them shall not nor will at any time hereafter have claim or pretend to any such dower right or title of dower or other estate right title or interest pretense claim or demand as aforesaid of in or to or out of the said premises or any part thereof with their appurtenances but of & from the same & every part thereof shall & will be from henceforth utterly debarred & excluded forever by these presents.

In witness whereof the party hereunto has set her hand and seal this 2nd. day of October, A. D. 1862.

E. E. LOCKWOOD. [L. S.]

In the presence of
O. T. B. WILLIAMS.
M. H. GLENNIN.

STATE OF MICHIGAN, *Alpena County, ss:*

On the 2nd. day of October 1862 before me personally appeared Eliza E. Lockwood & acknowledged to me that she executed the above instrument to which her name is subscribed freely & without fear or compulsion from any one.

O. B. T. WILLIAMS,
Notary Public.

(Backed:) Quit claim deed. J. K. Lockwood to Geo. N. Fletcher.

74 REGISTER'S OFFICE, *Alpena County, ss:*

Received for record May 30 A. D. 1859 at 10 o'clock P. M. and recorded in Liber A of Alpena County Records of Deeds on page 6.

J. K. MILLER, *Register.*

(On back:) 26. Eq. Report of master. R. H. Spalding, adm'r. pl'ff; Geo. N. Fletcher *et al.*, d'f'ts. Suffolk, *ss:* Supreme Judicial Court. Filed Aug. 31, 1887. (S'g'd) Attest: John Noble, clerk.

(*Fletcher's Objection- to Report.*)

Supreme Judicial Court. In Equity.

SUFFFOLK, *ss:*

RUFUS H. SPALDING, Adm'r,
v
GEORGE N. FLETCHER.

Objections of George N. Fletcher, one of the defendants, to the report of Hon. F. W. Hurd, master, filed with the master, and to be returned with his report in pursuance of Rule 31 (chancery).

1. This defendant objects that the findings of the Master in respect to the alleged purchase by William White of an interest in the Mouth of the River lands, so called is against the evidence and weight of the evidence, & he objects that the evidence has not been reported to the Court as requested by him, & will ask the Court to order such report to be made.

2. This defendant objects to the findings of the Master in respect to the Mouth of the River lands is against the weight of the
75 evidence which he has himself reported, in that he finds in section 8, that White delivered the $9000 obligations to

the defendant as payment by said White for one half interest in the Mouth of the River Lands, under the agreement of partnership set out in the report: whereas said agreement does not call for or authorize any such payment.

3. Because the Master admitted in evidence against the Defendant's objection, two certain letters of this defendant, copies of which are annexed to the report marked A & B respectively. He makes the same objection to the admission and annexing of Exhibits C, D, E, F & G, all said letters & exhibits are objected to as irrelevant and impertinent.

4. This defendant objects to all the matters and things contained in Sections 9, 10, 11, 12 & 13, of the report as irrelevant and tending to the prejudice of this defendant, and as contrary to the agreement of the parties as set forth in the last clause of section 15, of the report, "to present to the Court the preliminary question of the Defendant's liability with plaintiff."

5. This Defendant objects to the report that the facts stated therein do not under the bill, answer and other pleadings authorize an account to be taken concerning the Mouth of the River Lands, so called.

(Signed) GEO. N. FLETCHER,
By his Att'y, LYMAN MASON.

(On back:) R. H. Spalding *vs.* Geo. N. Fletcher & *al.* Objections to master's report. Filed by master with his report Aug. 31, 1887.

76 (*Recommittal to Master.*)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

RUFUS H. SPALDING
vs.
GEORGE N. FLETCHER ET AL.

This case is recommitted to the Master, that he may report his findings upon the question whether a partnership existed between George N. Fletcher and William White and James Campbell, or either of them, and if so, what were the terms of that partnership?

Whether at any time it terminated as to either of them, and what the interest of William White was in that partnership?

Whether any title to the mouth of the river lands, and if so what was acquired by William White, and how and when it was acquired, and how paid for, and whether any and what deeds or writings were made concerning the same, or what if any, written evidence supports the claim of said White's Administrator or concerning said lands.

And report such evidence on said points as the parties may agree,

or failing that, such as either party may ask for, unless he sees some good reason for not reporting the whole or any part of what is asked for in which case he shall report such reason. The parties may be heard before the Master on the question of reporting the evidence or any part thereof.

Dec. 6, 1889.

(S'g'd) W. A. FIELD, *J. S. J. C.*

By the Court:

(S'g'd) JOHN NOBLE, *Clerk.*

December 7, 1889.

77 (On back:) 26. Supreme Judicial Court. In Equity. Spaulding, adm'r. Fletcher & *al.* Order of recommittal. (In pencil:) Dec. 7/89.

(*Master's Report on Recommittal.*)

Supreme Judicial Court. In Equity.

SUFFOLK, *ss:*

RUFUS H. SPALDING, Adm'r,
vs.
GEORGE N. FLETCHER ET AL.

Pursuant to a rule recommitting the above entitled cause upon certain matters directed to be inquired into by said order of recommittal, I have been attended by the parties and their counsel and have examined the evidence and testimony produced before me, with the arguments of counsel thereon, and report thereof:—

18. I find that a co-partnership was created between George N. Fletcher, William White and James Campbell, by the written agreement dated Sept. 1, 1858, and marked as "exhibit No. 1, G. M. R.", a copy whereof is incorporated in the report already made by me in this cause, and by the terms of said agreement the profits and losses of the firm were to be divided in the same proportion in which the capital was to be contributed viz: one half to said Fletcher and one half to said White and Campbell. I find that said co-partnership continued until the death of William White, April 28, 1872.

19. I find that the terms of said co-partnership as stated
78 in said written agreement were never varied by any express agreement, written or verbal, between the parties. Whether or not they were varied by implication is to be determined by the law as applied to the facts reported in this cause.

20. By the terms of said agreement the capital of said firm was to consist, 1st, of 15,814 acres of Pine lands, valued therein, at $30,000, to be contributed one half by said Fletcher, and the other half by White and Campbell; 2nd, the undivided half of the so called lands at the mouth of the river then owned by said Fletcher, valued therein

at $18,000 to be contributed wholly by said Fletcher; 3rd, $18,000, in cash to be contributed equally by White and Campbell.

21. At the time said agreement of co-partnership was executed, viz: in January 1859, although dated Sept. 1, 1858, the paper title of said Pine lands stood in the name of Thomas Campbell, deceased, whose sole heir at law was John Campbell. Fletcher had an equitable interest in said lands under the agreement between himself and said Thomas Campbell, dated March 13, 1856, marked "Exhibit No. 9, G. M. R.", a copy whereof is incorporated in the report heretofore made.

By deed dated Dec. 10, 1859, said John Campbell conveyed said Pine lands to George N. Fletcher, James Campbell and William White, described in said deed as "co-partners under the firm name of the Thunder Bay Lumber Company." It did not appear that James Campbell who was the administrator of Thomas Campbell, made any payment in consideration of said conveyance dated Dec. 18, 1859; White accepted such interest as he acquired therein, in part satisfaction of a debt due him from the estate of Thomas Campbell.

At the same time, viz: in January 1859, the title to the mouth of the river lands stood in the names of said Fletcher as tenant
79 in common of one undivided half with Messrs. Lockwood and Oldfield; partition was made of such lands in October 1865, and one half thereof conveyed to Fletcher in severalty.

Fletcher has never by deed conveyed any interest therein to either James Campbell or William White.

22. Respecting the $18,000, cash which was to be contributed to said co-partnership, it did not appear that James Campbell ever contributed any. William White turned into said firm as assets the nine thousand dollar obligation mentioned in paragraphs 6 and 7, and also contributed the $11,558.55 mentioned in paragraph 9.

23. I make the following modifications of my findings heretofore made. In paragraph 8 I reported that James Campbell never acted upon, and made no payment under, the co-partnership agreement of Sept. 1, 1858; this finding I modify by reporting that he never acted upon or performed any part of said agreement except by being party to the aforesaid deed dated Dec. 18, 1859, and as appears as herein reported.

24. Whether any, and if any, what, title to the lands at the mouth of the river was acquired by William White, and how the same were paid for by him, depends upon the legal construction of said written agreement of Sept. 1, 1858, applied to the facts reported in this cause. No deeds or writings concerning said lands were produced other than as mentioned in the reports in this cause.

25. It is agreed that either party may cite or refer to any statute of the State of Michigan purporting to be published under the authority of said State, and also to any decisions of the Michigan Supreme Court and of the Supreme Court of the United States respecting the law of Michigan contained in the books of reports of cases adjudged in those Courts; and the same shall be taken and received as though found as the law of said State as facts in this report.

80 26. In compliance with the request of the parties I report herewith all the evidence taken or used before me, the same being contained in one bound volume of testimony taken before George M. Reed, Commissioner; one bound volume of testimony taken before John Miner, Commissioner; and two bound volumes of testimony taken before me; also 431 Exhibits produced before said Reed and two maps marked A & B and two cash books of William White; also 312 Exhibits produced before said Miner of which 140 are tax vouchers; also 145 Exhibits produced before me. Also four journals, two ledgers and one land book all of George N. Fletcher, and one Minnesota land book of James Campbell.

(Sgd.) FRANCIS W. HURD.

(On back:) 26. Eq. Rufus H. Spalding, adm'r, *v.* George N. Fletcher *et al.* Master's report upon recommittal. Suffolk, *ss.* Supreme Judicial Court. Filed Apr. 15, 1891. (Sgd.) Attest: C. H. Cooper, asst. clerk.

(*Objection to Report on Recommittal.*)

Supreme Judicial Court. In Equity.

SUFFOLK, *ss:*

RUFUS H. SPALDING, Adm'r,
v.
GEORGE N. FLETCHER ET AL.

The defendant, Fletcher, not waiving the objections to the Master's report on re-committal, nor, any of them, nor the objections
81 and exceptions to the Master's first report, hereby adopts the same in full as his exceptions to the said Master's report on recommittal, according to the provisions of Rule 32, for regulating Practice in Chancery.

April 30, 1891.

(Signed)
(")

JOHN LOWELL,
LYMAN MASON,
Def'ts Att'ys.

(On back:) No. 26. S. J. C. In Eq. Spalding, adm'r, *v.* Geo. N. Fletcher *et al.* Def't'- exceptions to master's report on recommittal. Suffolk, *ss.* Supreme Judicial Court. Filed Apr. 30, 1891. Attest: (Sgd) C. H. Cooper, asst. clerk.

(*Death and Insolvency of James Campbell.*)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

R. H. SPALDING, Adm'r,
v.
GEORGE N. FLETCHER ET AL.

Whereas James Campbell, one of the defendants in the above entitled action, has deceased, and John Starrett of Boston has been appointed executor of his will, and,

82 Whereas during the lifetime of said James Campbell in proceedings in insolvency in the Court of Insolvency for said County of Suffolk the said John Starrett and John Ritchie, Second, were duly appointed assignees in insolvency of the estate of said James Campbell, and,

Whereas said James Campbell has declared in evidence in this suit that an interest in certain property the subject of the proceeding therein, was held by him for the benefit of his father, John Campbell, late of —— in the County of Middlesex, and,

Whereas, said John Campbell having deceased Jabez A. Sawyer of Cambridge, in said County of Middlesex, is now the duly appointed Administrator *de bonis non* with the will annexed of said John Campbell, the Plaintiff moves the Court that each and all of said parties as representatives of said deceased may be summoned to appear and defend said suit under the provisions of Section 19, Chapter 165 of the Public Statutes.

(Signed) AUGUSTUS RUSS,
Plaintiff's Attorney.

(On back:) 26. Eq. Spalding *v.* Fletcher. Motion to summon in adm'r, &c. May 15, allowed. Suffolk, *ss.* Supreme Judicial Court. Filed May 15, 1891. (Signed) Attest: C. H. Cooper, Ass't Clerk. From the office of Augustus Russ.

83 SUFFOLK, *ss:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING
vs.
GEORGE N. FLETCHER ET AL.

Now comes John Starrett, upon whom an order of this Honorable Court dated May 15, 1891, was served, and says that the said James Campbell died on or about Sept. 29, 1884, testate; that his will was duly probated and he was appointed executor thereof on Nov. 25, 1884, and duly gave notice of his appointment within three months

thereafter, and that thereafter he duly administered upon and settled the Estate of said James Campbell, and paid out and disposed of all the property and assets, which came into his hands or possession as such executor, and rendered his final account thereof, which was duly allowed on January 7, 1890.—all of which he is ready to verify. Wherefore he prays the judgment of this Honorable Court, if the said plaintiff ought to have or maintain his said action or bill against him.

(Signed) By His Att'ys, RICHARDSON & HALE.

(On back:) 26. Equity. Rufus H. Spalding *v.* George N. Fletcher *et al.* Answer of John Starrett. Suffolk, *ss.* Supreme Judicial Court. Filed Jun- 3, 1891. Attest: (Sgd.) C. H. Cooper, Ass't Clerk. Richardson & Hale for John Starrett.

84 (*Stipulation for Submission to Arbitration.*)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING, Adm'r,
vs.
GEORGE N. FLETCHER ET AL.

Said Complainant, Rufus H. Spalding, and said defendant, George N. Fletcher, and Frances M. Brown, who has been made a party to said suit, agree to submit to the arbitration of Hon. William C. Endicott, of Salem, Massachusetts, all the claims and demands set forth in said suit, and all other claims and demands which either party may have against the other; and especially all claims and demands which said Spalding as administrator may have, or which the estate of his intestate may have, against said Fletcher, and all claims which the said Fletcher may have against said Spalding as administrator, or against said estate, whether represented by said Spalding or by any successor in the administration of said estate, and all claims which the said Frances M. Brown may have against said Fletcher, or that said Fletcher may have against said Frances M. Brown.

And the said George N. Fletcher and the said Frances M. Brown, each respectively, covenant, promise and agree, to and with each other, for themselves and their respective heirs, executors and administrators that they will abide by and faithfully perform and fulfill all the terms and conditions of any award which may be made by said arbitrator, or by any substitute or successor as hereinafter
85 provided; and said George N. Fletcher, for himself and his heirs, executors and administrators, and said Rufus H. Spalding for himself and for the estate which he represents, covenants, promises and agrees, each to and with the other as follows:

The said Fletcher covenants, promises, and agrees that he will and his heirs, executors and administrators shall faithfully fulfill and perform all the terms and conditions of any award which may be

made by said arbitrator, or his substitute or successor as aforesaid, for the doing of any act or the payment of any sum of money which said arbitrator may award that he shall do or pay to said Spalding, as administrator of the estate of said White, and that he will and his heirs, executors and administrators shall likewise perform and pay any such award to any successor of said Spalding in the administration of said estate, and said Spalding covenants, for himself and his successors, not personally but as an obligation of the estate, that said estate shall perform and fulfill any award and pay any sum which said arbitrator shall award to be paid by said estate to said Fletcher; and said Frances M. Brown covenants, promises and agrees to and with said Fletcher that if said Spalding shall decease, or be removed from the administration of said estate, his successor shall well and truly abide by and perform all the terms and conditions of any award made by said arbitrator, or his substitute or successor as aforesaid, which are to be performed and fulfilled by said estate or by its administrator to said Fletcher; it being the intention of this submission to forever settle all controversies between all said parties, and that the decease of any party shall not revoke said submission, but that said arbitration shall continue, and that the successors of said Spalding, and the legal representatives of said Brown and said Fletcher, shall be bound by the final award therein.

86 And it is further agreed by the said parties that if said arbitrator shall decease, or shall become incapacitated to act as arbitrator, then in that case the parties shall agree upon an arbitrator who shall take his place, with all the power and authority herein submitted to the arbitrator herein named, and if the parties shall fail to agree to make such appointment within thirty days from the decease or incapacity of said arbitrator, either party may apply to any Judge of the Supreme Court to appoint an arbitrator in the place of the arbitrator hereby appointed, who shall have all the powers and authority vested in the arbitrator herein named.

And it is further agreed that all the evidence hereinbefore taken in said cause, either under the commissions appointed by the court, or before the Master appointed in said cause, and the reports of said Master, shall be submitted to said arbitrator, but the reports shall not have the same force and effect as the same would have had and received in a hearing before said Court, but they shall have only such force and effect, if any,. as the Arbitrator may see fit to give them, it being agreed that a judgment of the arbitrator shall be final upon all the questions of law and fact, except as hereinafter provided, and that any of said evidence which may be regarded by said arbitrator as inadmissible or incompetent, may be rejected by him.

And it is agreed that in the hearing of the questions submitted to the arbitrator he shall first pass upon the general question of liability or non-liability and announce his decision without taking any additional evidence; and in case he shall decide that a liability exists the parties shall have a reasonable time to produce evidence and determine the amount of said liability. And when the final award shall be made by said arbitrator, either party may apply to

87 said court for a decree to enforce the same, or the same may be enforced by a decree or judgment in any other court, hav-

ing jurisdiction of the parties. And the prevailing party shall be entitled to have a decree or judgment entered in any court having jurisdiction over the party against whom such award may be made, in conformity with the award so made, as a judgment entered by consent which is hereby given.

Upon the final report of the arbitrator any questions of law except those arising upon the admissibility and weight of the evidence shall be reserved for the decision of the Court, upon the request of either party, and in this connection the statutes and decisions of Michigan shall be admissible without other proof than the recognized books of statutes and reports and any question arising thereon shall be treated as a question of law and not of fact.

The submission is to be made under a rule of this Court and not to operate as a discontinuance of said suit.

In Witness Whereof the parties hereto have set their hands and seals, this Fourth day of April, 1892.

(S'g'd) GEO. N. FLETCHER, [SEAL.]
" FRANCES M. BROWN, [SEAL.]
" RUFUS H. SPALDING, [SEAL.]
Administrator.

(On back:) No. 26. Supreme Judicial Court, Suffolk, *ss.* In equity. Rufus H. Spalding, admr. *v.* Geo. N. Fletcher & *als.* Agreement of arbitration. Spalding *v.* Fletcher. Suffolk, *ss.* Supreme Judicial Court. Filed June 6, 1892. (Sgd) Attest: C. H. Cooper, asst. clerk.

88 *(Amendment Making Frances M. Brown Party.)*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

R. H. SPALDING, Adm'r,
vs.
GEORGE N. FLETCHER ET AL.

And now said complainant comes and moves the Court for leave to amend his bill in said section, by inserting therein the name of Frances M. Brown, wife of Albert W. Brown, of Boston, in said County of Suffolk, and that she may be duly summoned to answer to said bill and to all allegations contained in this amendment.

Complainant alleges that said Frances M. Brown is the sole heir of William White his intestate. That she claims that at the decease of said William White said George N. Fletcher was seized of many valuable parcels of real estate in the State of Michigan, which said Fletcher held as trustee for himself and said White, and that many of said parcels of real estate were sold by said Fletcher after the death of said White and before and since the appointment of this complainant as administrator, and that said Fletcher received large sums

of money and that she is entitled to the same, or to a share of the same, as the sole heir of said White, and that said Fletcher should account directly to her instead of to your complainant as administrator.

And your complainant further alleges that he will be unable to properly administer the estate of said White without a disclosure of said Fletcher of the sums which he received from said parcels
89 of real estate sold by him after the death of said White, and without a decree which shall decide and settle the claims of said Frances M. Brown thereto; and so he prays that she may be made a party to said suit and answer thereto.

(S'g'd) RUFUS H. SPALDING, *Adm'r,*
By His Attorney RODNEY LUND.

(On back:) No. 26. Equity. Supreme Judicial Court, Suffolk, *ss.* Rufus H. Spalding, adm'r, *vs.* Geo. N. Fletcher & *al.* Amendment—joining Frances M. Brown as def't. This may be filed. (Sgd.) J. Lowell, for G. N. Fletcher. Suffolk, *ss.* Supreme Judicial Court. Filed Jun- 6, 1892. Attest: (Sgd.) C. H. Cooper ass't clerk.

(Answer of Frances M. Brown.)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

RUFUS H. SPALDING, Adm'r,
v.
GEORGE N. FLETCHER ET AL.

Now Frances M. Brown comes and appears and answers to the amended bill as follows:

She admits all the allegations in the plaintiff's bill con-
90 tained, and she says it is true as alleged in the plaintiff's amendment that she claims that said Fletcher is accountable to her for large sums of money ..nch are the proceeds of real estate held in his name in a trust capacity for himself and said intestate. She alleges that said intestate and said Fletcher were jointly interested in the lands which now form a large part of the City of Alpena, and other lands in Michigan and that said lands stood in the name of said Fletcher, but were held on joint account, and that said intestate and said Fletcher were partners in the holding and management of said lands; and she says that said Fletcher has sold many parcels of said lands and that at the decease of said White said Fletcher had realized from said sales large sums of money, far more than sufficient to satisfy all the debts and obligations of the partnership, and that after accounting with said plaintiff as administrator for the monies received by him up to the time of the decease of the plaintiff's intestate, he, said, Fletcher, should account with her for the proceeds of all sales made since that date, and should also convey to

her an undivided half of all the estates remaining in his name, whether a part and parcel of the lands, originally purchased by said Fletcher and held as partnership property, or whether the same consist of other parcels of real estate received in exchange for such partnership property.

(S'g'd) FRANCES M. BROWN.

(On back:) No. 26. In equity. Supreme Judicial Court, Suffolk, *ss.* Rufus H. Spalding, adm'r, *v.* Geo. N. Fletcher & *als.*
91 Answer of Frances M. Brown. This may be filed. (Sgd.) J. Lowell, for G. N. Fletcher. Suffolk, *ss.* Supreme Judicial Court. Filed June 6, 1892. Attest: (Sgd.) C. H. Cooper, ass't clerk.

(Rule of Reference to Endicott.)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

RUFUS H. SPALDING, Adm'r,
v.
GEO. N. FLETCHER & *als.*, Def'ts.

And now the parties appear and agree to refer this action to the determination of William C. Endicott of Salem, in this Commonwealth in accordance with the stipulation of the parties on file, a copy of which is hereto annexed. Pleadings may be amended or supplemented by any party.

Report to be made as soon as may be; judgment thereon to be final and execution to issue accordingly; and if either party neglects to appear on due notice, then the referee to proceed *exparte.*

(S'g'd) JOHN NOBLE, *Clerk.*

This form is agreed to.

J. LOWELL,
For G. N. Fletcher.
RODNEY LUND, *For Pl'ff.*

June 6, 1892.

(On back:) No. 26. Rule of reference.

92 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING, Adm'r,
v.
GEORGE N. FLETCHER ET AL.

Said complainant, Rufus H. Spaulding, and said defendant, George N. Fletcher, and Frances M. Brown, who has been made a

party to said suit, agree to submit to the arbitration of Hon. William C. Endicott, of Salem, Massachusetts, all the claims and demands set forth in said suit, and all other claims and demands which either party may have against the other; and especially all claims and demands which said Spalding as administrator may have, or which the estate of his intestate may have, against said Fletcher, and all claims which the said Fletcher may have against said Spalding as administrator, or against said estate, whether represented by said Spaulding or by any successor in the administration of said estate, and all claims which the said Frances M. Brown may have against said Fletcher, or that said Fletcher may have against said Frances M. Brown.

And the said George N. Fletcher and the said Frances M. Brown, each respectively covenant, promise and agree to and with each other, for themselves and their respective heirs, executors and administrators, that they will abide by and faithfully perform and fulfill all the terms and conditions of any award which may be made by said arbitrator, or by any substitute or successor as hereinafter provided; and said George N. Fletcher, for himself and his heirs, executors and administrators, and said Rufus H. Spald-
93 ing for himself and for the estate which he represents, covenants, promises and agrees each to and with the other as follows:

The said Fletcher covenants, promises and agrees that he will and his heirs, executors and administrators shall faithfully fulfill and perform all the terms and conditions of any award which may be made by said arbitrator, or his substitute or successor as aforesaid, for the doing of any act or the payment of any sum of money which said arbitrator may award that he shall do or pay to said Spalding, as administrator of the estate of said White, and that he will, and his heirs, executors and administrators shall likewise perform and pay any such award to any successor of said Spalding in the administration of said estate, and said Spalding covenants, for himself and his successors, not personally but as an obligation of the estate, that said estate shall perform and fulfill any award and pay any sum which said arbitrator shall award to be paid by said estate to said Fletcher; and said Frances M. Brown covenants, promises and agrees to and with said Fletcher that if said Spaulding shall decease, or be removed from the administration of said estate, his successor shall well and truly abide by and perform all the terms and conditions of any award made by said arbitrator, or his substitute or successor as aforesaid, which are to be performed and fulfilled by said estate or by its administrator to said Fletcher; it being the intention of this submission to forever settle all controversies between all said parties, and that the decease of any party shall not revoke said submission, but that said arbitration shall continue, and that the successors of said Spalding, and the legal representatives of said Brown, and said Fletcher, shall be bound by the final award therein. And it is further agreed by the said parties that if said arbitrator shall decease or shall become incapacitated to act as arbitrator, then in that
94 case the parties shall agree upon an arbitrator who shall take his place, with all the power and authority herein submitted

to the arbitrator herein named, and if the parties shall fail to agree to make such appointment within thirty days from the decease or incapacity of said arbitrator, either party may apply to any judge of the Supreme Court to appoint an arbitrator in the place of the arbitrator hereby appointed, who shall have all the powers and authority vested in the arbitrator herein named. And it is further agreed that all the evidence hereinbefore taken in said cause, either under the Commissions appointed by the Court, or before the master appointed in said cause, and the reports of said Master, shall be submitted to said arbitrator, but the reports shall not have the same force and effect as the same would have had and received in a hearing before said Court, but they shall have only such force and effect, if any, as the arbitrator may see fit to give them, it being agreed that a judgment of the arbitrator shall be final upon all the questions of law and fact, except as hereinafter provided, and that any of said evidence which may be regarded by said arbitrator as inadmissible or incompetent, may be rejected by him. And it is agreed that in the hearing of the questions submitted to the arbitrator he shall first pass upon the general question of liability or non-liability and announce his decision without taking any additional evidence; and in case he shall decide that a liability exists the parties shall have a reasonable time in which to produce evidence and determine the amount of said liability. And when the final award shall be made by said arbitrator, either party may apply to said Court for a decree to enforce the same, or the same may be enforced by a decree or judgment in any other Court, having jurisdiction of the parties.

95 And the prevailing party shall be entitled to have a decree or judgment entered in any Court, having jurisdiction over the party against whom such award may be made, in conformity with the award so made, as a judgment entered by consent which is hereby given.

Upon the final report of the arbitrator any questions of law except those arising upon the admissibility and weight of the evidence shall be reserved for the decision of the Court, upon the request of either party, and in this connection the Statutes and decisions of Michigan shall be admissible without other proof than the recognized books of statutes and reports, and any question arising thereon shall be treated as a question of law and not of fact.

The submission is to be made under a rule of this Court and not to operate as a discontinuance of said suit.

In Witness Whereof the parties hereto have set their hands and seals, this fourth day of April, 1892.

(Signed) GEO. N. FLETCHER. [SEAL.]
" FRANCES M. BROWN. [SEAL.]
" RUFUS H. SPAULDING, [SEAL.]
Administrator.

(On back:) No. 26. Eq. Spalding *vs.* Fletcher. Agreement & Order to Wm. C. Endicott.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING, Adm'r,
versus
GEORGE N. FLETCHER ET AL.

The parties to the above entitled cause, having become satisfied that the Hon. William C. Endicott, named arbitrator under
96 a rule of this Court pursuant to the terms of articles of agreement to submit to arbitration on file in this Court, is physically unable to proceed with said arbitration without serious danger to himself, do, pursuant to the terms of said articles, agree upon, and request the Court to appoint the Hon. William L. Putnam, arbitrator in his place, and to recall and revoke the previous appointment, and that a rule may issue to that effect.

Boston, 18 October 1893.

(Sgd.) JOHN LOWELL,
For George N. Fletcher.

(Sgd.) GEO. WM. ESTABROOK,
For the Other Parties Complainant & Frances M. Brown.

(On back:) 26. Supreme Judicial Court, Suffolk, *ss.* In equity. R. H. Spalding, adm'r, *v.* Geo. N. Fletcher & *al.* Agreement as to arbitration. Oct. 18, 1893. Granted—and rule to issue accordingly. Att.: (Sgd.) John Noble, clerk.

97 (*Rule of Reference to Putnam.*)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

RUFUS H. SPALDING, Adm'r,
v.
GEORGE N. FLETCHER ET ALS.

And now the parties appear and agree to refer this action to the determination of William L. Putnam, in accordance with the stipulation of the parties on file, a copy of which is hereto annexed, (the previous reference to William C. Endicott having been revoked, upon motion of the parties). Pleadings may be amended or supplemented by any party; report to be made as soon as may be; judgment thereon to be final and execution to issue accordingly; and if either party neglects to appear on due notice, the referee to proceed *ex parte.*

(Signed) JOHN NOBLE, *Clerk.*

Oct. 18, 1893.

(On back:) No. 26. Eq. Rule of reference. Spaulding *v.* Fletcher.

(*Suggestion of Death of Rufus H. Spalding, Complainant.*)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

RUFUS H. SPALDING, Administrator,
vs.
GEORGE N. FLETCHER ET AL.

And now comes Frances M. Brown, one of the parties, Plaintiff,
and says that Rufus H. Spaulding, the administrator of the
98 estate of William White, deceased July 15th, 1892, and she,
the said Frances M. Brown has by decree of the Probate Court for the County of Suffolk, been duly appointed as administratrix *de bonis non* of the estate of said William White, and respectfully prays that she may be allowed to prosecute this cause on behalf of said estate.

(Sgd.) By Her Att'y, DUDLEY A. DORR.

(On back:) 26. Eq. R. H. Spalding, adm'r, &c., *v.* G. N. Fletcher. Suggestion of death, &c. Petition granted. Dec. 18, 93. J. L., J. S. J. C. I have no objection to granting this petition. (Sgd.) J. Lowell, for G. N. Fletcher. Suffolk, *ss.* Supreme Judicial Court. Filed Dec. 18, 1893. Attest: (Sgd.) C. H. Cooper, asst. clerk.

(*Preliminary Award of Putnam.*)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING, Administrator, Now FRANCES M. BROWN, Administratrix,
v.
GEORGE N. FLETCHER ET AL.

Pursuant to the agreement signed by George N. Fletcher,
99 Frances M. Brown and Rufus H. Spalding, Administrator, dated the fourth day of April, Eighteen hundred and ninety-two, the entry made in the foregoing cause under date of October Eighteen, Eighteen hundred and ninety-three, and the agreement signed "Geo. M. Estabrook, for Mrs. Frances M. Brown, administratrix & individually," and "J. Lowell for defendant Fletcher," dated Boston, March Second, Eighteen hundred and ninety-four, copies of which are attached hereto, and are marked respectively and signed by me as follows:

"The foregoing is Exhibit A, attached to my award made April, Eighteen hundred and ninety-four, William L. Putnam." "The foregoing is Exhibit B, attached to my award made April, Eighteen

hundred and ninety-four, William L. Putnam." "The foregoing is Exhibit C, attached to my award made April, Eighteen hundred and ninety-four, William L. Putnam." I have heard the parties to said agreements, to wit, Frances M. Brown, individually, Frances M. Brown Administratrix, and George N. Fletcher, their proofs and counsel, and decide, determine and award as follows:

Article First. Said Frances M. Brown is the daughter and sole heir of William White of Boston, who deceased April Twenty-eight, Eighteen hundred and Seventy-three. At the time of his decease, said George N. Fletcher held the legal title in fee simple of the following real estate in Michigan, and subject to the partition hereinafter named, namely:

That one half in common conveyed to him by the Warranty deed of Erastus Bailey and wife to James K. Lockwood and him, said Fletcher, dated November twenty-one, Eighteen hundred and fifty-five, and recorded in Alpena County Records of Deeds, August twenty-three, Eighteen hundred and Seventy-two, Liber 1, page four hundred and fifty-four, and that one half in common con-
100 veyed to him by deed, dated April Eleven Eighteen hundred and fifty-nine, from James K. Lockwood, of one part, to him, said Fletcher, of the other part, and recorded in the same records, May thirty, Eighteen hundred and fifty-nine, Liber A, page Sixty-four.

Said Fletcher had, prior to the death of said White, to wit, on the first day of September, Eighteen hundred and fifty-eight, agreed with said White to convey to him, said White, his heirs and assigns, forever, one undivided fourth part of all the interests acquired by him, said Fletcher, by said two deeds from Erastus Bailey and wife and from James K. Lockwood, for a consideration which was fully paid by said White to said Fletcher before August fifteen, Eighteen hundred and Seventy-one.

Subsequent to said agreement of September one, Eighteen hundred and fifty-eight, and in October, Eighteen hundred and sixty-five, there had been a paritition, by deed, between said Fletcher and the parties owning the other half in common of the lands of which one-half in common was conveyed to said Fletcher by said deeds from said Bailey and wife and said Lockwood, by means of which partition said Fletcher's one-half interest therein was set out to him in severalty; but the details of the parcels so set out to him need not be described herein. Said parcels, however, so set out to him in severalty, stand for all present purposes, and for all the matters hereinafter appearing in this decision, determination and award, in lieu of and subject to the same rights and duties as the said one-half interests in common conveyed to him, said Fletcher, by the deeds aforesaid; and wherever hereinafter the interests so conveyed to said Fletcher, are referred to, the same are to be construed as meaning and intending to cover the parcels thus set out in severalty to said Fletcher. Though at the time of the death of said White, said Fletcher so held the legal title to all the interests conveyed to
101 him by said two deeds from said Erastus Bailey and wife and from said Lockwood, yet he, said Fletcher then held one-

fourth part in common of all such interests in trust for said White, his heirs and assigns, by virtue of the agreement aforesaid, dated September one, Eighteen hundred and fifty-eight, and by virtue of the payments made by said White to said Fletcher as aforesaid, and had not conveyed to said White any part thereof, nor, since the death of said White, has he conveyed to said Frances M. Brown any part thereof. At the death of said White, said Fletcher was liable and holden in law, and is still liable and holden in law, to convey the same one-fourth part in common to said White, his heirs and assigns, to his and their use forever, on demand by said White, his heirs or assigns; but said White had not demanded such conveyance and had left the entire property subject to the management and control of said Fletcher for the common interests.

Article Second. Said Fletcher is now holden to convey, and he shall convey, to said Frances, as such sole heir of said White, her heirs and assigns, to her and their use forever, one-fourth part in common of all the interests acquired by him, said Fletcher, by said two deeds from said Erastus Bailey and wife, and from said Lockwood, including one-fourth part of all the parcels so set off to him in severalty, except so far as the same have, prior to this award, been sold or otherwise disposed of by him, said Fletcher, said conveyance to be made forthwith, if no balance is due to him, said Fletcher, from said Frances M. Brown, individually or as administratrix, as hereinafter set out; or, if any such balance is due, then forthwith upon the payment thereof.

The character of the deed to be given by said Fletcher to said Frances M. Brown, shall be such as to embrace all the same right, title and interest acquired by him in and to said one-fourth
102 part in common, subject to the exceptions aforesaid of parcels sold or disposed of by him prior to this award, with a proper Warranty that the same are free of any incumbrances created by, through or under him, except unpaid taxes, which are to be assumed and paid by said Frances M. Brown.

Article Third. Prior to and at the time of the death of said White, said Fletcher had, to a certain extent, the management of certain other lands in the State of Michigan which had been conveyed by deed or deeds to George N. Fletcher, James Campbell and William White. The share of said White in the said lands named in this article was one-fourth part in common, and the record and equitable title in fee was vested in him in his lifetime, and was vested, and ought to be vested, in said Frances as his sole heir, after his decease.

Article Fourth. Prior to the decease of said White, and on the fifteenth day of August, Eighteen hundred and Seventy-one, all matters to that date between said Fletcher and said White, relating to any of the foregoing lands named in articles one, two and three, or either of them, or to the management or sale or other disposition of them, or to improvements upon them or in connection with them, or to stumpage taken from them, or otherwise in reference thereto, were settled, and the balance ascertained.

Article Fifth. Said Fletcher is holden to said Frances, as administratrix, and to compensate, and shall compensate her, as admin-

istratrix, for the balance due from said Fletcher to said White, as shown by said settlement of August fifteen, eighteen hundred and Seventy-one, and for her proportion of all moneys and property received by him, said Fletcher, since the said fifteenth day of August, by reason of any matters described in Article Four occurring on or before said fifteenth day of August, and is holden to her, as
103 administratrix, to render account to, and shall account to her, as administratrix, and to compensate, and shall compensate her, as administratrix, to the extent of her proportion, for all matters of the character described in Article Four, occurring between said fifteenth day of August and the death of said White, and is holden to said Frances, individually, as sole heir of said White, to account to, and shall account to her, and is holden to compensate her, and shall compensate her to the extent of her proportion, for all matters of the character described in Article Four, occurring since the death of said White. The proportion so to be accounted and compensated for is one fourth and no more; and the account and compensation shall be on the principles applying between trustee and *Cestui que trust;* with all allowances which may be found due according to such principles; but with reference to all the premises said Fletcher is entitled, and shall be entitled, to allowances from said Frances as such administratrix, and from said Frances individually, as the case may be, of and for all his payments, if any, to said White, or to said Spalding, as such administrator, or to said Frances, as such administratrix, or to said Frances individually, on account of the premises since said fifteenth day of August, and to one-fourth part of all his such reasonable and just disbursements and allowances in reference thereto, since said fifteenth day of August, as he may be found entitled to on the said principles of accounting between trustee and *cestui que trust.*

Article Sixth. Said Fletcher is not holden or liable to said Frances, either as administratrix or individually, for any stock in the Alpena Harbor Improvement Company, or for the sum of forty-two hundred and fifty dollars, or any part thereof, being the amount said to have been received by said Fletcher from said White for investment in such stock.

104 Article Seventh. There is no liability either way with reference to any matter submitted to my arbitration, except as stated in the foregoing articles one to six, each inclusive.

Article Eighth. Said Frances as administratrix shall recover from said Fletcher the taxable costs of this suit and of this arbitration, including the fees and disbursements of the arbitrator.

The foregoing articles one to eight, each inclusive, constitute my decision, determination and award, and are not modified by anything hereinafter set out.

But whereas the agreement hereto attached, Marked "Exhibit A," provided that, on the final report of the arbitrator, certain questions of law should be reserved for the decision of the Court, on the request of either party;

And whereas, pending the hearing, the complainant filed with me a paper entitled "Plaintiffs' suggestions of findings," and also a paper

setting out plaintiffs' further specifications of claims, copies of which are appended hereto, respectively marked by me as follows, "Exhibit D," and "Exhibit F," "attached to my award of April, Eighteen hundred and ninety-four, William L. Putnam," and said Fletcher filed with me, as aforesaid, a paper entitled "Defendant Fletcher requests the Court to find under the evidence as follows," a copy of which is appended hereto and marked "Exhibit E, attached to my award of April, Eighteen hundred and ninety-four, William L. Putnam."

Now therefore, I make the following statements concerning the only questions of law which I conceive to be involved in the foregoing determination, decision and award, being ready, however, to make such further statements touching any other questions of law thus involved, if either party in interest shall show to me that any have been omitted.

With reference to the Statute of frauds, parties put in evi-
105 dence before me, by the agreement marked "Exhibit A," all the Statutes of Michigan and all the decisions of the Courts thereof touching the same. I found, as a matter of fact, that the obligations and liabilities of said Fletcher and the trust imposed on him, all as set out in the foregoing award, except those relating to the lands described in Article three, originate with the contract dated September one, Eighteen hundred and fifty-eight, already referred to, of which a copy is appended hereto, marked: "The foregoing is Exhibit F.F., attached to my award of April, Eighteen hundred and ninety-four, William L. Putnam," which contract was executed and delivered, and bound the parties, and was in force at the death of said White and ever since; and all arose out of said contract and the other matters herein stated.

I do not find that payment of the balance of Eighteen thousand dollars in cash was made as provided in said contract; but I did find that said White made full payment to said Fletcher during life time of said White for the one-fourth interest of the one-half in common of the lands conveyed by Bailey and wife and by Lockwood, as hereinbefore set out, to said Fletcher; that the said one-half in common so conveyed to said Fletcher, was the same as that described in said agreement of September first, Eighteen hundred and fifty-eight, as one undivided half of the Bailey and Lockwood and Minor purchases, so called, of lands at the Mouth of Thunder Bay River in said State; that there were no lands at the mouth of Thunder Bay River to which such description in said agreement could apply, except those of which one undivided half was conveyed by the deeds aforesaid to said Fletcher; that the evidence of the identity of the one undivided half described in said contract with the half in common conveyed by said deeds, was, as a matter of fact, conclusive, and, as a matter of fact, there was no misunderstanding and could be
106 no misunderstanding between the parties to the contract, or by any other person who might investigate with reasonable care, touching the same, although at the date of said contract said deeds had not been recorded; that although the Eighteen thousand dollars was not paid in cash as provided in said agreement, strict

compliance with this provision was waived by said Fletcher, and payment for said White's one-fourth interest was made, as already said, in a manner accepted by said Fletcher in lieu of the form of payment provided by said contract, and in all respects as the equivalent thereof, so far as concerned said White's one-fourth interest, although the precise manner of said payment I did not determine.

Said Contract was made in the State of Massachusetts, James Campbell, named therein, and said White then residing in Massachusetts, and said Fletcher then residing in Michigan; but whether or not the Statute of frauds of Massachusetts or the Statute of frauds of Michigan is applicable to the case, I did not find it necessary to determine, because I rule that the transaction was sufficient under all the circumstances to bind said Fletcher, as hereinbefore set out, under the Statute of frauds of Massachusetts or under the Statute of frauds of Michigan. As bearing on this proposition, I found that not only did White make full payment for his said one-fourth interest as aforesaid, but that said White paid said Fletcher, and said Fletcher accepted from said White, partly by advances by said White and partly by allowances in account, sundry amounts on account of said White's one-fourth of the expenditures made by said Fletcher, upon and in reference to the interests deeded by said Bailey and wife and said Lockwood to said Fletcher, including among other things said White's one-fourth of the cost of constructing a mill on the lands, of lithographing maps of the lands showing the
107 lots into which they were divided for sale, of taxes thereon for several years, and of various incidental expenses running through the period commencing with the date of said Contract, and ending with the death of said White. I further found that, during the life time of said White, said Fletcher, in numerous dealings with said White, practically recognized the interest of said White as aforesaid. I also found that in a letter from said Fletcher to W. A. Righter, dated the fourteenth day of February, Eighteen hundred ninety—he wrote said Righter as follows: "Two years since I sold Mr. White one-quarter for $9000," but I did not find sufficient in this letter to identify the lands under the requirements of the Statute of frauds, and therefore I gave no effect to this letter on that particular point; and the same observation applies to other letters and the lithographic plan, put into the case, I found no facts touching the question of the Statute of frauds except as herein stated. I did not determine whether or not the relation between Fletcher and White was that of Copartners. I did not find it necessary so to do, because the present obligations and liabilities of said Fletcher to said Frances, individually and as administratrix, are precisely the same, and an accounting and settlement between the parties to this award can be completely made, and would be made in precisely the same manner and with the same results, whether or not there was a Copartnership, or whether or not the relationship was merely that of a joint or common interest in pine lands and other lands, to be developed, managed and disposed of by said Fletcher for the benefit of all concerned. Moreover, it may be that the interests of the widow of said William White are involved in the question whether these lands

were held by said White and Fletcher merely as joint tenants or co-
tenants, or strictly as copartners, and the said widow was not
108 a party to the proceedings before me; so the proper parties
were not before me to enable me to dispose of that question.

It was claimed by said Frances M. Brown, individually and as administratrix, that the interest of said William White was one-half instead of the one-fourth found by me in my foregoing award, in other words, that said White acquired the interest intended for James Campbell under said Contract of September first, Eighteen hundred and Fifty-eight. It appears by the proofs before me that said James Campbell was adjudged insolvent on the thirteenth day of May, Eighteen hundred and seventy-nine, and that such interests as he had, if any he had, were subject to an accounting and an equitable lien as between him and the estate or heirs of his father. Therefore, as neither said James Campbell, nor his assignee in insolvency, if there is such assignee, nor the representatives of his father's estate, nor the heirs of his father, were parties to the proceedings before me, I was not in position to adjudicate touching the interests, if any there were, vesting in said James Campbell, or to determine whether they are still outstanding, or were forfeited and surrendered to said Fletcher, I was unable to find from any proof before me that they were transferred to said White. Touching the subject matter of the third and fourth paragraphs in the said requests of defendant Fletcher, attached hereto, I made no finding nor determination, as I was able to determine, decide and award all the foregoing facts without the aid of any matters claimed to have been mutilated.

Touching all other matters contained in the said suggestions of the Complainant and the said requests of the defendant Fletcher, I perceive nothing as to which I found it necessary to pass upon any question of law; as the matters herein already stated, so far as I
am able to perceive cover all questions of law which it be-
109 came necessary for me to pass upon in order to reach my determination, decision and award touching any fact hereinbefore set out.

All the books and papers which have come into my possession, I have deposited in the vault in the office of the Clerk of the United States Circuit Court for the District of Massachusetts, where I will hold the same subject to the joint order of the parties to this award, or to the order of the Court.

Before publishing the above award I submitted a draft of it to George W. Estabrook, attorney for the complainant, and another draft to Hon. John Lowell, Attorney for defendant Fletcher, and received certain suggestions, per the letter of George W. Estabrook to me, dated May fifth, Eighteen hundred and Ninety-four, a copy of which is hereto attached, marked "Exhibit G," attached to my award of April, Eighteen hundred and ninety-four, William L. Putnam," and letter of Hon. John Lowell, addressed to me under date of May twelfth, Eighteen hundred and ninety-four, a copy of which is attached hereto marked "Exhibit H, attached to my award of April, Eighteen hundred and ninety-four, William L. Putnam."

I have made no award touching interest due to or from Fletcher,

or touching any allowance for his alleged claim for services, as I understand that my authority at the present time is limited to stating the general rules of accounting so far as they are necessarily involved in the "general question of liability or non-liability."

Boston, April 27, 1894.

(S'g'd) WILLIAM L. PUTNAM.

110 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING, Adm'r,
v.
GEORGE N. FLETCHER ET AL.

Said Complainant, Rufus H. Spalding, and said defendant, George N. Fletcher, and Frances M. Brown, who has been made a party to said suit, agree to submit to the arbitration of Hon. William C. Endicott, of Salem, Massachusetts, all the claims and demands set forth in said suit, and all other claims and demands which either party may have against the other; and especially all claims and demands which said Spalding as Administrator may have, or which the estate of his intestate may have, against said Fletcher, and all claims which the said Fletcher may have against Spalding as administrator, or against said estate, whether represented by said Spalding or by any successor in the administration of said estate, and all claims which the said Frances M. Brown may have against said Fletcher, or that said Fletcher may have against said Frances M. Brown.

And the said George N. Fletcher and the said Frances M. Brown, each respectively, covenant, promise and agree, to and with each other, for themselves, and their respective heirs, executors, and Administrators, that they will abide by and faithfully perform and fulfill all the terms and conditions of any award which may be made by said arbitrator, or by any substitute or successor as hereinafter provided; and said George N. Fletcher, for himself and his heirs,

Executors and Administrators, and said Rufus H. Spalding
111 for himself and for the estate which he represents, covenants, promises and agrees each to and with the other as follows:—

The said Fletcher covenants, promises, and agrees that he will and his heirs, Executors and Administrators shall faithfully fulfill and perform all the terms and conditions of any award which may be made by said Arbitrator, or his substitute or successor as aforesaid, for the doing of any act or the payment of any sum of money which said arbitrator may award that he shall do or pay to said Spalding, as Administrator of the estate of said White, and that he will and his heirs, Executors and Administrators shall likewise perform and pay any such award to any successor of said Spalding in the administration of said estate, and said Spalding covenants, for himself and his successors, not personally but as an obligation of the estate, that said estate shall perform and fulfill any award and pay any sum which said arbitrator shall award to be paid by said Estate to said

Fletcher; and said Frances M. Brown covenants, promises and agrees to and with said Fletcher that if said Spalding shall decease, or be removed from the administration of said Estate, his successor shall well and truly abide by and perform all the terms and conditions of any award made by said arbitrator, or his substitute or successor as aforesaid, which are to be performed and fulfilled by said estate or by its Administrator to said Fletcher; it being the intention of this submission to forever settle all controversies between all said parties, and that the decease of any party shall not revoke said submission, but that said arbitration shall continue, and that the successors of said Spalding, and the legal representatives of said Brown and said Fletcher, shall be bound by the final award therein.

And it is further agreed by the said parties that if said arbitrator shall decease, or shall become incapacitated to act as arbitrator, then in that case the parties shall agree upon an arbi-
112 trator who shall take his place, with all the power and authority herein submitted to the arbitrator herein named, and if the parties shall fail to agree to make such appointment within thirty days from the decease or incapacity of said arbitrator, either party may apply to any Judge of the Supreme Court to appoint an arbitrator in the place of the arbitrator hereby appointed, who shall have all the powers and authority vested in the arbitrator herein named.

And it is further agreed that all the evidence hereinbefore taken in said cause, either under the Commissions appointed by the Court, or before the Master appointed in said cause, and the reports of said Master, shall be submitted to said arbitrator, but the reports shall not have the same force and effect as the same would have had and received in a hearing before said Court, but they shall have only such force and effect, if any, as the arbitrator may see fit to give them, it being agreed that a judgment of the Arbitrator shall be final upon all the questions of law and fact, except as hereinafter provided, and that any of said evidence which may be regarded by said Arbitrator as inadmissible or incompetent, may be rejected by him.

And it is agreed that in the hearing of the questions submitted to the arbitrator he shall first pass upon the general question of liability or non-liability and announce his decision without taking any additional evidence; and in case he shall decide that a liability exists the parties shall have a reasonable time to produce evidence and determine the amount of said liability.

And when the final award shall be made by said arbitrator, either party may apply to said Court for a decree to enforce the same or the same may be enforced by a decree or judgment in any other Court having jurisdiction of the parties. And the prevailing
113 party shall be entitled to have a decree or judgment entered in any Court, having jurisdiction over the party against whom such award may be made, in conformity with the award so made, as a judgment entered by consent which is hereby given.

Upon the final report of the arbitrator any questions of law except those arising upon the admissibility and weight of the evidence shall be reserved for the decision of the Court, upon the request of either

party, and in this connection the Statutes and decisions of Michigan shall be admissible without other proof than the recognized books of Statutes and reports, and any question arising thereon shall be treated as a question of law and not of fact. The submission is to be made under a rule of this court and not to operate as a discontinuance of said suit.

In Witness whereof the parties hereto have set their hands and seals, this fourth day of April, 1892.

(Signed) GEO. N. FLETCHER. [SEAL.]
FRANCES M. BROWN. [SEAL.]
RUFUS H. SPALDING, [SEAL.]
Administrator.

The foregoing is Exhibit A, attached to my award made April, Eighteen hundred and ninety-four.

(Sgd.) WILLIAM L. PUTNAM.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

RUFUS H. SPALDING, Adm'r,
v.
GEORGE N. FLETCHER ET ALS.

And now the parties appear and agree to refer this action to the determination of William L. Putnam, in accordance with the stipulation of the parties on file, a copy of which is hereto annexed, (the previous reference to William C. Endicott having been re-
114 voked, upon motion of the parties) Pleadings may be amended, or supplemented by any party; report to be made as soon as may be; judgment thereon to be final and execution to issue accordingly; and if either party neglects to appear on due notice; then the reference to proceed *ex parte.*

JOHN NOBLE, *Clerk.*

October 18, 1893.
A true copy.
Attest:
(Signed) C. H. COOPER,
Ass't Clerk.

The foregoing is Exhibit B, attached to my award made April, Eighteen hundred and Ninety-four.

(Signed) WILLIAM L. PUTNAM.

(*Supplemental Agreement.*)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING, Adm'r,
v.
GEORGE N. FLETCHER ET ALS.

The parties agree that in passing upon the general question of liability or non-liability, the arbitrator shall find the proportions for which Mr. Fletcher shall account, if liable, and announce the same in the first instance, and that the accounting shall proceed on this basis, but neither party hereby waives the right to apply for a modification of the finding if a proper case for such application shall arise.

(Sgd.) GEO. WM. ESTABROOK,
For Mrs. Frances M. Brown, Administratrix & Individually.

(Sgd.) J. LOWELL, *For D'ft Fletcher.*

Boston, 2 March, 1894.

115 The foregoing is Exhibit C. attached to my award made April, Eighteen hundred and ninety-four.

(Signed) WILLIAM L. PUTNAM.

Plaintiff's Suggestions of Findings.

First. That Fletcher is liable and must account to the Plaintiffs for one-quarter of the partnership pine lands and the proceeds and profits therefrom.

Second. That Fletcher is liable and must account to the Plaintiffs for one-half of the lands at the Mouth of the Thunder Bay River or the Bailey and Minor and Lockwood purchases, so called and the proceeds and profits therefrom.

Third. The Copartnership of Fletcher, Campbell and White was formed by Articles of Partnership (Exh. 1 Reed) and continued till White's death. James Campbell has since died and Fletcher is the sole surviving partner. The affairs of the partnership have never been settled and it is Fletcher's duty to account.

Fourth. The assets of the partnership include, Pine Lands, Mouth of River Lands, Cash, proceeds of sales, and exchanges to be ascertained on the accounting.

Fifth. The assets of the partnership embrace the Mouth of the River Lands. The full contribution of the assets of the partnership set out in the Articles was made. While contributing ¼ of the Pine Lands, and James Campbell also contributing ¼ of the pine lands, and White also contributing a legal or equitable interest in the Mouth of the River Lands valued at $9000 and cash $9000.

Fletcher contributed the same being as much and no more than he agreed, and White contributed all required to meet both his and Campbell's obligation by the Articles, except the ¼ of the Pine Lands which Campbell contributed personally.

116 Sixth. The partnership was in possession of the Mouth of the River Lands during White's life and spent large sums in improvements on them, and expenses connected with them, and had fully paid the consideration therefor, and those lands were treated by the partnership as assets till death of White.

Seventh. White had from Fletcher some instrument vesting in him a legal or equitable interest to the extent of ½ of Fletcher's interest in Mouth of the River Lands.

Eighth. White had from Campbell some interest vesting in him whatever legal or equitable interest Campbell had at the inception of the partnership in the Mouth of the River Lands.

Ninth. The Articles of Copartnership are a sufficient agreement or Memorandum to take the case out of the Statutes of Frauds.

Tenth. The description of the land in the Partnership Articles is sufficient.

Eleventh. The writings put into the same were sufficient under the Statute of Frauds to vest the partnership with the lands known as the Bailey and Lockwood and Minor purchases to wit: the lands described in deed of Erastus Bailey to Geo. N. Fletcher and J. K. Lockwood, dated Nov. 21, 1855, Exh. 22 Hurd, and in agreement, bond and deed dated respectively Jan. 12 & 15, 1857, and April 11, 1859, and Exh. G. H. and J. Miner.

Twelfth. The Articles of Partnership constitute a sufficient memorandum under the Statute of Frauds to warrant a decree for a conveyance of such lands, if they did not constitute a conveyance, and for account of proceeds of such lands.

Thirteenth. On all the facts in the case the partnership was vested with a sufficient title to require an accounting by Fletcher to the Plaintiffs for the Mouth of River Lands.

117 Fourteenth. Fletcher conspired with Campbell and Mrs. White to defraud the estate, and is liable for the damage occasioned thereby.

Fifteenth. Fletcher conspired with Campbell and Mrs. White to defraud Mrs. Brown of her interest in real estate of William White, and is liable for the damages occasioned thereby.

Sixteenth. In pursuance of the conspiracy between himself, James Campbell and Mrs. White, Mr. Fletcher produced in evidence the paper Ex. 2 Reed, as the original paper described in the Probate Account of James Campbell. The paper and all the endorsements upon it are in the handwriting of Fletcher and are all false and fictitious and were intended by him to defraud the Plaintiffs.

Seventeenth. In pursuance of the conspiracy Fletcher made numerous alterations, mutilations and erasures on and suppressed his books of account and also suppressed and fabricated papers to conceal the facts relative to the payment of the $9000 indebtedness and to conceal the facts as to White's interests and properties and put the same in evidence with the intention of defrauding the plaintiffs.

Eighteenth. In pursuance of the conspiracy Fletcher misrepresented to and concealed from the plaintiffs information in his possession and knowledge as to White's interest and properties.

Nineteenth. Fletcher converted to his use stock of White's in the Alpena Harbor Improvement Co. of the value of 5250 at the time of the conversion, which was some time in 1873.

Twentieth. Fletcher was indebted to White for $4200 received by him for his, White's use, on or before March, 1869, for invalid stock in Alpena Harbor Improvement Co.

118 Twenty-First. That this being a bill in equity the entire equities between all the parties to the bill may be adjusted as they should be found to exist, and the rule of reference is still broader than the bill, and permits a full adjustment between White's Estate and its representatives and Fletcher, therefore the full equitable interests of White's estate in the entire one-half of the assets at the Mouth of the River, and all profits arising therefrom may properly be allowed to White's estate in this finding without any intermingling with Campbell.

Twenty-Second. That James Campbell, was a party defendant in this suit, and in his answers denies that he claims any interest in any joint transactions between said White and said Fletcher and in his testimony denied that he had any interest in any of the land at the Mouth of the River — even put any money into them in any way, and after his death his estate having been given an opportunity to intervene in this suit, and having declined on the ground that its affairs were settled, said James Campbell was, and his estate is estopped from setting up any claim to any interest in the lands at the Mouth of the River, or from setting up any claim which shall prevent the full settlement of the controversy between the estate of White and Fletcher.

Exhibit D attached to my award of April 1894.

(Signed) WILLIAM L. PUTNAM.

119 *Defendant Fletcher's Request for Findings.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING, Administrator of William White, Deceased, Complainant,

vs.

GEORGE N. FLETCHER, JAMES CAMPBELL, and ELIZA WHITE, Defendants.

Before Hon. Wm. L. Putnam, Special Referee.

Defendant Fletcher requests the Court to find under the evidence as follows:

1. That the title of all the lands known in this case as pine lands, acquired by Thomas Campbell, deceased, and George N. Fletcher

under the contract in writing between them, dated March 13, 1856, and all substitutions for any part of them under and by reason of the cancellation by Government of original entries, became vested in fee simple in George N. Fletcher (in the proportion of an undivided half) William White, the decedent, (in the proportion of an undivided quarter), and James Campbell (in the proportion of an undivided quarter), by the deed of John Campbell, sole legal heir of Thomas Campbell, bearing date and duly executed on December 10, 1859.

2. That the defendant Fletcher never made an agreement, which was valid under the Statute of Frauds of Michigan, conveying or agreeing to convey to complainants' decedent William White any lands or any interest in lands in the State of Michigan.

120 3. That no presumption is raised against Fletcher for mutilations of his books of account and paper writings produced by him, or for changes in entries, where such changes are not shown to have been made in his handwriting, or such changes and mutilations are not shown to have been made, or directed by him or made when such books and papers were in his custody and control.

4. That this presumption of his custody and control, and of the continuance of his custody and control, from the fact that he produced the books and papers before the Master in this hearing is rebutted in this case by the evidence that without his knowledge and without leave of Master or the Court, a representative of the complainant, for a period of three months, had free and unobserved access to them, and finally removed them from the United States without Fletcher's knowledge or consent, and without leave of the Court.

5. That at the death of Thomas Campbell, George N. Fletcher owed him, (exclusive of other obligations admitted to have been paid by him) Nine Thousand Dollars ($9000.00) under and by virtue of the contract between them, dated March 13, 1856.

6. That said debt of George N. Fletcher was turned over to decedent William White, by the Administrator of Thomas Campbell's estate, in part payment of a claim which White is alleged to have had against Thomas Campbell's Estate, amounting to $17,438.67, and was accepted by White *pro tanto*.

7. That said White used said Nine Thousand Dollars debt of Fletcher as part payment for his quarter interest in said pine lands derived by him under the deed aforesaid from John Campbell to Fletcher, White and James Campbell, and that the said Nine Thousand Dollar debt of Fletcher was accepted by Thomas Campbell's Estate and John Campbell in part consideration for said

121 deed when it was subsequently delivered to the grantees.

8. That William White never afterward owned the said Fletcher debt.

9. That William White never turned in the said Nine Thousand dollar debt of Fletcher under the Articles of Partnership bearing date September 1, 1858, in partial fulfillment of the agreements of said Articles.

10. That the said obligation or debt of Fletcher was never accepted by him, or by him and James Campbell in whole or in part as a ful-

fillment of any obligation of White, or of White and Campbell under said Articles.

11. That the Articles of Partnership never became operative, and were abandoned by all the parties thereto.

12. That although the language of the Partnership *of the Partnership* Articles imports a partnership *in presenti*, if the things agreed to be done by the parties were not in fact done at the time of the execution, this rendered it a contract *in futuro*.

13. Either party had a right to require the other to furnish his or their portion of the capital as a *sine qua non* to the formation of the partnership.

Bird *vs.* Hamilton, Walk. Ch. (Mich.) pp. 361-368.

14. The fact that Fletcher carried on the business for a time in the name of the proposed firm, in the hope and expectation that the other parties to the contract would comply with its terms, is no waiver of his right to defend on the ground that the contract was never fulfilled and would not entitle White to his rights as a partner.

(Walker Ch. (Mich.), *supra.*)

122 15. That the decedent White never made advances or payments of money to Fletcher under and in pursuance of the Partnership Articles with the intent or purpose to make up the cash capital named in said Articles.

16. That the alleged advances of money and dealings in money between Fletcher and White were made and had in pursuance of an understanding between the parties, with an intent and purpose to realize a return from the pine lands alone, and not with the intent and purpose of carrying out and operating under the Partnership Articles.

17. That Fletcher fully repaid to White and to White and Campbell from the proceeds of the pine lands, and property acquired strictly in realizing from the pine lands, (like the dam for log storage) all that was borrowed or obtained by them or either of them and advanced to Fletcher.

18. That the agreement of the three parties to form a partnership each to contribute lands, by conveyance to three as a firm, and two to contribute cash to make up the nominal capital stock, and fixing the proportions of each in a common stock made up to carry on a specific business, cannot be construed into a contract on the part of any one of the parties to convey lands to two of the proposed firm, or to one of the proposed firm, unless such change in the contract be evidenced by a writing signed by the party sought to be charged as required by the Michigan Statute of Frauds.

19. That a contract to convey lands by one to himself and two others for expressed purposes in which the grantor is jointly interested, radically differs from a contract to sell lands; and to hold that such a change a new agreement may be shown by oral testimony, would be against the letter and the policy of the Statute of Frauds.

20. That as it appears that Fletcher exercised a stewardship or

agency for his Co-owners of the pine lands in Michigan, he
123 is held to account in this suit in the proportion of one-quarter for all monies received and paid out on account of said pine lands.

21. Defendant Fletcher cannot be held in this case to any accounting to the Estate of William White for the lands at the Mouth of Thunder Bay River or elsewhere in the State of Michigan other than said pine lands.

22. If defendant Fletcher is accountable to White's representative or heir in respect to the Mouth of the River lands, it is for one-quarter and not one-half.

D. M. DICKINSON &
J. LOWELL,
Per J. LOWELL.

Exhibit E, attached to my award of April eighteen hundred and ninety-four.

(Signed) WILLIAM L. PUTNAM.

Whereas, by virtue of the submission in this case all matters now existing between the parties to the said suit including Frances M. Brown, in her capacity as heir of William White, and also as Administratrix *de bonis non* of the estate of William White, are included in said submission, and she has claims against George N. Fletcher which are not included in the bill in said suit, she therefore now specifies the nature and character of the claims in addition, which she insists upon being included in this hearing, as follows:

First. She claims all the interest, which at the time of his decease was held or claimed by William White, deceased, in all land in Michigan, whether standing in the name of George N. Fletcher, or James Campbell and William White, or in the name of the Thunder Bay Lumber Company, and all the receipts from the sale of any such lands since the decease of said William White; and all receipts arising from such sale or from the sale of lumber of stumpage from the said lands or in any other way.

124 Second. And the said Frances M. Brown, as administratrix *de bonis non* further represents that the said George N. Fletcher for consideration of $4250—to him paid by said White, sold the said White one hundred and five (105) shares of the Capital Stock of the Alpena Harbor & Improvement Company, alleged to be a Corporation duly and legally organized under the laws of the State of Michigan, but the said Alpena Harbor & Improvement Company was not legally constituted as aforesaid, and no stock actually existed therein, in law and the said Fletcher should account to and repay her, the said sum with interest from Mch. 1869, being the date of the alleged sale with interest; and further represents that prior to the decease of William White, the said Fletcher agreed with him to retake the said stock of him, and pay him therefore the sum of $5250 said stock being at that time supposed to be valid issue, but said White dying before the agreement was fully consummated by the delivery of the stock and payment therefor, said Fletcher sub-

sequently to the decease of said White and the appointment of the Administrator upon his state, took from Eliza White, widow of the said William White, the Certificate found among the papers of the said William, representing the said stock or shares, being in such form that an apparent title could be passed by delivery, and wrongfully paid her therefore the sum of $5250 with a view to convert the same to his own use, the said sum of $5250 being then the market value or less than the market value of said stock, and avers that said Fletcher owes and should account to her as Administratrix, for the sum of $5250 with interest from the date in 1873 of such conversion.

Third. That by reason of the conspiracy and acts done in pursuance thereof, between the said George N. Fletcher, James
125 Campbell and Eliza White, the estate of said William White, and Frances M. Brown as heir of said estate, have been and are being put to a large amount of expense, time and trouble in endeavoring to obtain from the said Fletcher the property, interest and rights belonging to them, in the hands and possession and under the control of said George N. Fletcher; and she claims all damages that have arisen, or shall arise to her or said estate in consequence of such conspiracy.

Fourth. Frances M. Brown also claims and requests that said George N. Fletcher may be ordered to convey to her all the lands or interest in the lands at the Mouth of the River so called, and in all the Pine Lands in Michigan, which William White owned at the time of his death and which stood then or since, in the name of said Fletcher or in the name of the Thunder Bay Lumber Company.

(Sgd.) By Her Att'y, DUDLEY A. DORR.

Exhibit F attached to my award of April, eighteen and ninety-four.

(Signed) WILLIAM L. PUTNAM.

Articles of Agreement this day made and entered into by and between George N. Fletcher of St. Clair, Michigan, on the one part, and James Campbell of Burlington and William White of Boston, both in the Commonwealth of Massachusetts, of the other parts.

Witnesseth: That the said parties mutually agree to form, and do, by these presents, form themselves into a Company for the purpose of manufacturing lumber at the Mouth of Thunder Bay river, in the town of Fremont, and State of Michigan, to be called the "Thunder Bay Lumber Company" with a capital stock of Sixty-Six thousand (66,000) dollars, fully paid in, in manner and
126 form as hereafter fully described. One-half, or thirty-three thousand (33,000) dollars, by George N. Fletcher, and thirty-three thousand (33,000) dollars in equal parts, by James Campbell and William White, as follows, viz:

By the said Fletcher, Fifteen Thousand dollars, being his portion of fifteen thousand eight hundred and fourteen acres of Pine Lands, now standing in the name of Thomas Campbell, in the State of Michigan, and Eighteen Thousand (18,000) dollars being one un-

divided half of the Bailey and Lockwood and Minor purchases, so called, of lands at the Mouth of Thunder Bay River, in said State; and thirty-three thousand (33,000) dollars by James Campbell and William White $15,000 in the lands, being the balance of the interest of the late Thomas Campbell in all the lands now standing in his name, situated as aforesaid, and the balance $18,000 in cash.

It is understood and agreed that all profits and losses of the said Company shall be mutually and equally divided between the said Fletcher on the one part, and James Campbell and William White on the other part; and it is further agreed, for the purpose of building a mill and carrying on the business of manufacturing lumber, that the said parties shall furnish such amount of capital as may be deemed advisable, one-half by the said Fletcher, and one-half by the said Campbell and White; and if either party shall at any time furnish more than his proportionate amount, then the said Company shall pay interest for the same, at the rate of seven per cent. per annum.

It is further agreed that the time of either party, when devoted to the special interests of the Company, shall be allowed such compensation for his services as may be hereafter agreed upon.

GEO. N. FLETCHER.
WILLIAM WHITE.
JAMES CAMPBELL.

Witness:
H. W. HARRINGTON.

Boston, Sept. 1, 1858.

127 The foregoing is Exhibit F F attached to my award of April, Eighteen hundred and Ninety-four.
(Signed) WILLIAM L. PUTNAM.

BOSTON, *May* 5, 1894.

Hon. William L. Putnam.

DEAR SIR: The counsel for Mrs. Brown, and Mr. & Mrs. Brown themselves, have carefully examined the award, and the following suggestions are made in their behalf.

We would like to have the second article provide that Mr. Fletcher shall account for all moneys or property received by him prior to August 15, 1871, in payment or exchange for lots sold prior to August 15, 1871, which do not appear to have been accounted for by him to Mr. White, because we fear he may have sold lots before that date, for which he did not account to Mr. White, and because there can be no injustice to Mr. F. in this, since the facts are within his knowledge, and the books should show the transactions, and the record shows all the lots he owned.

If any was sold he can show when he received the payments, & when & how he accounted for them. We suggest that Article 4 should provide that he must account to Mrs. Brown for property as well as money received; and we make the suggestion also as to this article that we made as to Article 2.

As to interest we think it should be allowed with annual rests from the bringing of the bill until damages are allowed to Mrs. B. for the injury she suffered from the acts of Mr. F. which have so long deprived her of her inheritance, and put her to such large expense & suffering.

I am instructed also to say that it seems to our clients since you have not specifically referred to the question of conspiracy,
128 that it may have escaped your notice and if so we would like a finding in regard to it.

Also it seems that as to the Harbor & Imp. Stock, we suggest that it seems to us upon the uncontested evidence that Fletcher took the stock from Mrs. White in execution of a contract he made with Mr. White before his death and gave her his note for $5250 therefor and retained the stock, keeping it from the Administrator though all White's property in his hands was demanded from him by the Administrator, and converted it to his own use, when it had a value which the administrator could have sold it for of said sum of $5250. If it had no value then it had none when F. sold it to White, and in that case he should pay the 4200 back which W. paid for it to him. One of these propositions must be true, either F. should pay what he agreed to pay W. for the stock, and what he attempted to pay Mrs. W. for it; or, second, he has converted it to his own use & withheld it from the administrator, and he is liable for the value at the time of the conversion; or, third, he sold worthless stock to W. & should pay back the money received for it with interest.

See evidence referred to in Compl'ts Argument, vol. 2, pp. 276 to 295.

We do not see that you have made yet any finding or award as to the costs of the suit & expenses of the arbitration.

Should not the award determine which party shall pay them, finally? Or did you think it better to leave the matter to await the final award on the accounting?

Yours truly,

(Sgd.) GEO. WM. ESTABROOK.

Exhibit G attached to my award of April 1894.

(Signed) WILLIAM L. PUTNAM.

129 BOSTON, 12 *May*, 1894.

MY DEAR JUDGE PUTNAM: I had hoped to hear from Mr. Dickinson in regard to any suggestions for changes in detail of your award. I have seen Mr. Fletcher, however, and we wish the following changes.

1. The accounting should not be regarded as beginning with the settlement of the account of August 15, 1871. At that time, as I understand, Fletcher had made improvements which he did not charge in that account, either because the time for settling those items had not arrived, or for some other sufficient reason.

In other words, if in that account there were omissions as to any of the lots, those lots should now be accounted for.

It is, I believe, true, that Fletcher in accounting did not consider *all the lots* to be owned with White, as, indeed, he had always maintained. Even if he was mistaken and if that mistake caused the inadequacy of the account, still, it should now be corrected, and the account be made up on the ground of your award.

2. By the contract, either party making advances beyond his proportional amount, is allowed interest at the rate of Seven *per cent.* upon them.

3. "The time of either party when devoted to the special interests of the Company, shall be allowed such compensation for his services as may be hereafter agreed upon" by the same contract. No agreement having been made *quantum meruit* should be allowed.

Yours truly,
(Sgd.) J. LOWELL.

Exhibit H attached to my award of April 1894.
(Signed) WILLIAM L. PUTNAM.

130 (On back:) No. 26. Eq. Spalding *v.* Fletcher. Report of referee. Filed May 22, 1894. (Sgd.) Att.: C. H. Cooper, asst. clerk.

(*Suggestion of Death of Fletcher, etc. Motion to Summon in the Defendant Fletcher's Administrator.*)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

No. 26.

R. H. SPALDING ET ALS.
vs.
GEORGE N. FLETCHER ET AL.

And now comes the plaintiff and represents that the defendant George N. Fletcher deceased at Detroit, Michigan on November 5th, 1899, leaving a will which has been probated in said Detroit and also in the County of Middlesex in this Commonwealth, and Frank B. Cotton of Brookline, in the County of Norfolk and said Commonwealth, has been duly appointed by said Probate Court for the County of Middlesex as administrator of the estate of said George N. Fletcher deceased, with the will annexed, and the plaintiff respectfully prays that said Frank B. Cotton administrator as aforesaid, be cited in by this Honorable Court as a party defendant to this action.

(Sgd.) FRANCES M. BROWN, *Adm'r,*
By her Att'y, DUDLEY A. DORR.

131 (On back:) Supreme Jud. Ct. In Equity. No. 26. Spalding *et al. vs.* Fletcher & *al.* Motion. Suffolk, *ss.* Supreme Judicial Court. Filed Apr. 27, 1900. Attest: (Sgd.) C. H. Cooper, asst. clerk. (Sgd.) Allowed, per Barker, J.

(*Citation to Cotton.*)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

RUFUS H. SPALDING, Adm'r,
vs.
GEORGE N. FLETCHER ET AL.

And now in the above entitled cause the death of the defendant, George N. Fletcher, is suggested of record, and it is ordered by the Court, on motion of the plaintiff, that Frank B. Cotton of Brookline in the County of Norfolk, Administrator with the will annexed of the estate of said George N. Fletcher, deceased, be cited to appear at said Court to be holden at Boston within and for said County of Suffolk, on the first Monday of June next, by serving him with an attested copy of this order fourteen days, at least, before said
132 first Monday of June next, that he may then and there appear and take upon himself the defence of said action if he sees fit.

By the Court.

(Sgd.) JOHN NOBLE, *Clerk.*

April 27, 1900.

(On back:) 26. Eq. Rufus H. Spalding, Adm'r, *v.* George N. Fletcher *et als.* Citation.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

RUFUS H. SPALDING, Adm'r,
vs.
GEORGE N. FLETCHER ET AL.

And now in the above entitled cause the death of the defendant, George N. Fletcher, is suggested of record, and it is ordered by the Court, on motion of the plaintiff, that Frank B. Cotton of Brookline in the County of Norfolk, Administrator with the will annexed of the estate of said George N. Fletcher, deceased, be cited to appear at said Court to be holden at Boston within and for said County of Suffolk, on the first Monday of June next, by serving him with an attested copy of this order fourteen days, at least, before said first Monday of June next, that he may then — there appear and take upon himself the defence of said action if he sees fit.

April 27, 1900.

By the Court.

JOHN NOBLE, *Clerk.*

[SEAL.] A true copy.

Attest:

(Sgd.) C. H. COOPER,
Ass't Clerk.

10 ct. rev. stp., documentary.

133 (On Back.)

BOSTON, *May 4th*, 1900.

SUFFOLK, *ss:*

I this day served the within precept upon the within named Frank B. Cotton by delivering to him in hand, an attested copy thereof.

Fees.

Service	.50
Copy	1.00
Travel	.08
	1.58

(Sgd.) FRANCIS MARTIN,
Deputy Sheriff.

26. Eq. Spalding, Adm'r, *v.* Fletcher *et al.* Citation.

Petition of F. M. B. to Make Heirs of G. N. F. Party.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

SPALDING, Administrator,
vs.
FLETCHER ET AL.

To the Supreme Judicial Court, in equity:

Your petitioner, Frances M. Brown, of the City of Boston, in said Commonwealth, by this her petition, not waiving any right that she may have to ask that the consideration of her amended petition, dated the 26th day of August, 1901, already on file in this Court, to make the heirs of the said defendant George N. Fletcher parties defendant to this suit as of the date of the death of said George N. Fletcher to the same extent and with like effect to all intents
134 and purposes as their ancestor said George N. Fletcher in his life time was a party to said cause, which has been reported to the full Court,

Respectfully represents and shows to the court as follows:

1. Your petitioner is the administratrix *de bonis non*, and sole heir-at-law of William White, late of said City of Boston, and she is the sole complainant in this case.

2. The bill of complaint in this case was filed by your petitioner's predecessor in estate, on the 24th day of April, 1874, and the object of which is to secure an accounting and settlement and winding up of the affairs of a partnership previously existing between the defendants George N. Fletcher, James Campbell and your petitioner's intestate, William White, under the name of the Thunder Bay Lumber Company, and which partnership was dissolved by the death of the

said William White, as, by reference to said bill, will more fully appear.

3. This court became vested with full and complete jurisdiction of the subject matter of said bill and of all the parties defendant to this cause, and such proceedings were thereafter had in the suit, that your petitioner became lawfully substituted as the sole complainant therein, and appeared in said cause and does now appear therein, as well — in her capacity of administratrix *de bonis non,* as that of the sole heir at law of said William White.

4. On the 18th day of October, 1893, by rule of this court, duly entered in said cause, the said suit was referred to the determination of the Hon. William L. Putnam, in accordance with the submission and stipulation of the parties filed in the cause. A copy of said stipulation is hereto annexed and marked "A," in and by which as, by reference thereto will appear, the parties covenanted
135 for their heirs and representatives, amongst other things, that the decease of any of the parties thereto should not revoke the submission, but that the arbitration should continue, and that the award thereunder should be faithfully performed and fulfilled by their respective legal representatives.

5. The defendant George N. Fletcher at the time of the commencement of this suit was a non-resident of this commonwealth, and then resided and was domiciled in the State of Michigan, where he continued to reside and maintain his domicile up to the time of his death as hereinafter referred to.

6. Such proceedings were had under the said submission, that afterwards, to-wit, on the 27th day of April, 1894, the said William L. Putnam, in accordance with the stipulation of the parties, made and published a partial award or decision, on the question of liability or non liability submitted to him, in which award or decision he found in favor of your petitioner and determined and decided that your petitioner was entitled to an accounting from the defendant Fletcher on the basis of one fourth interest in said partnership, as by reference to said finding on file in this court will more fully appear.

7. Your petitioner further represents, that as soon as practicable thereafter, she caused the necessary and proper steps to be taken to secure a full, true and accurate accounting by said Fletcher, pursuant to the said finding and award, and she avers that she prosecuted the same with all practicable diligence, and at great cost and expense, but she was obstructed and delayed in divers ways by the said Fletcher in her efforts to discover the true state of the affairs of said partnership and of the disposition of the assets thereof which came into the control of the said Fletcher as the surviving manag-
136 ing partner. And your petitioner represents and shows that the proceedings for the accounting were still pending when the death of the said George N. Fletcher occurred.

8. The death of the said Fletcher occurred on or about the 6th day of November, 1899, at the City of Detroit, in the State of Michigan, where he was then domiciled.

9. The said George N. Fletcher left surviving him three children, whose names respectively are Frank W. Fletcher, Allan M. Fletcher

and Grace Fletcher, who comprise all the heirs at law of the said George N. Fletcher, and all of whom are of lawful age and all of whom reside in the State of Michigan.

10. The will of the said George N. Fletcher was duly proved and allowed in the Probate Court for the County of Wayne in said State of Michigan, which court had jurisdiction for the purpose, and letters testamentary were issued to the said Frank W. Fletcher and Allan M. Fletcher, as the executors of such will, and the said parties are now acting as the executors of said will, within the said State of Michigan.

11. Your petitioner further represents, that the said George N. Fletcher died possessed of a large and valuable estate which by the provisions of his said will he devised and bequeathed in equal shares to his said children and heirs at law.

Your petitioner upon her information and belief, which information she derives from the records of the proceedings in said estate on file in the said Probate Court, says that the value of the estate to be distributed amongst his said children and heirs at law of which the said George N. Fletcher died seized and possessed, exceeds in value the sum of four hundred thousand dollars.

12. Your petitioner further represents, that the said executors, although requested so to do, failed to come into or to be represented in this cause, but declined and refused to further regard the proceedings therein as having any binding effect upon them or the estate which they held as such executors in Michigan or elsewhere outside of this commonwealth, and your petitioner shows, that the counsel who appeared for and represented the defendant George N. Fletcher in his life time in this suit, caused his appearance as such counsel to be withdrawn, on, to wit, the 1st day of May, 1900.

137

13. An administrator with the will annexed, has been appointed by the Probate Court for Middlesex County, Commonwealth of Massachusetts, for the estate of the said George N. Fletcher within this State, and said administrator has caused his appearance to be entered in this cause. But your petitioner avers, that the value of the estate and property of the said George N. Fletcher deceased, which has or can come within the control of such ancillary administrator, does not exceed the sum of one thousand dollars, as she is informed and verily believes and which sum is wholly insufficient to satisfy the just claim of your petitioner in this cause, which claim and demand your petitioner avers amounts to the sum of more than four hundred thousand dollars.

14. During the progress of this suit a very large amount of testimony has been taken by the parties, and many of the witnesses examined on behalf of the complainant in said cause have since died.

15. Your petitioner is advised and therefore submits, that, in order that this court may regularly make and enter a valid decree in this cause, which will be personally binding and conclusive upon the said heirs at law of the said defendant, George N. Fletcher, it is necessary that the said Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher personally be made parties defendant to this suit.

138 16. Your petitioner further represents and shows to the court, that the representatives and heirs of the said George N. Fletcher have already voluntarily appeared and made themselves parties (but not by name and only as a class designated and defined as representatives and heirs) to this suit since the death of their ancestor the said George N. Fletcher. Such appearance was entered by said representatives and heirs by the filing of a notice and instructions to Hon. Michael O'Brien, the commissioner of this court in this cause at Alpena, in the State of Michigan, and before whom proceedings were pending at the time of the death of said George N. Fletcher as aforesaid. A copy of said notice and instructions is hereto annexed, marked "B."

Your petitioner avers that at the time said notice bears date no executors or other representatives of the estate had been appointed in Michigan, and she further shows, and avers that the attorney whose name appears to said notice, was the same person who appeared before said commissioner on behalf of said George N. Fletcher in his life time, and that he was and is, as your petitioner is informed and believes, the local attorney for said representatives and heirs at Alpena in said State of Michigan.

Your petitioner therefore prays, that an order or decree of this court may be entered in said cause, specifying and declaring as follows:

First. That Frank W. Fletcher and Allan M. Fletcher the executors of the last will and testament of the deceased George N. Fletcher as aforesaid, and the said Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, the children and legal representatives of the said deceased George N. Fletcher, may be summoned in to defend this suit, in order that the cause may proceed to a final decree as contemplated by the covenant of submission of the parties to said cause,
139 hereinbefore referred to.

Second. That all necessary amendments to the pleadings in this cause may be made by either party, pursuant to the stipulation of the parties to that effect already on file in this cause.

Third. That the court may make such other and further or different orders and decrees in the premises as shall be agreeable to equity and the rights of the parties respectively.

(Signed) FRANCES M. BROWN.

(S'g'd) DUDLEY A. DORR,
Of Counsel.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Boston, October the first Nineteen hundred and one.

Then personally appeared the above named petitioner, Frances M. Brown, and made oath that the statements made in the foregoing petition are true.

Before me

(S'g'd) DUDLEY A. DORR.
Justice of the Peace.

Exhibit A.

Commonwealth of Massachusetts, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

Rufus H. Spaulding, Adm'r,
vs.
George N. Fletcher et al.

Said complainant, Rufus H. Spaulding, and said defendant
140 George N. Fletcher, and Frances M. Brown, who has been made a party to said suit, agree to submit to the arbitration of Hon. William C. Endicott, of Salem, Massachusetts, all the claims and demands set forth in said suit, and all other claims and demands which either party may have against the other; and especially all claims and demands which said Spaulding as administrator may have, or which the estate of his intestate may have, against said Fletcher, and all claims which the said Fletcher may have against said Spaulding as administrator, or against said estate, whether represented by said Spaulding or by any successor in the administration of said estate, and all claims which the said Frances M. Brown may have against said Fletcher, or that said Fletcher may have against said Frances M. Brown.

And the said George N. Fletcher and the said Frances M. Brown, each respectively, covenant, promise and agree to and with each other for themselves and their respective heirs, executors and administrators, that they will abide by and faithfully perform and fulfill all the terms and conditions of any award which may be made by said arbitrator or by any substitute or successor as hereinafter provided; and said George N. Fletcher, for himself and his heirs, executors and administrators, and said Rufus H. Spaulding, for himself and for the estate which he represents, covenants, promises and agrees each to and with each other as follows:

The said Fletcher covenants, promises and agrees that he will and his heirs, executors and administrators shall faithfully fulfill and perform all the terms and conditions of any award which may be made by said arbitrator, or his substitute or successor as aforesaid, for the doing of any act or the payment of any sum of money which said arbitrator may award that he shall do or pay to said Spaulding as
administrator of the estate of said White, and that he will,
141 and his heirs, executors and administrators shall likewise perform and pay any such award to any successor of said Spaulding in the administration of said estate, and said Spaulding covenants, for himself and his successors, not personally but as an obligation of the estate, that said estate shall perform and fulfill any award and pay any sum which said arbitrator shall award to be paid by said estate to said Fletcher; and said Frances M. Brown covenants, promises and agrees to and with said Fletcher that if said Spaulding shall decease, or be removed from the administration of said estate,

his successor shall well and truly abide by and perform all the terms and conditions of any award made by said arbitrator, or his substitute or successor as aforesaid, which are to be performed and fulfilled by said estate or by its administrator to said Fletcher; it being the intention of this submission to forever settle all controversies between all said parties, and that the decease of any party shall not revoke said submission, but that said arbitrator shall continue, and that the successors of said Spaulding, and the legal representatives of said Brown and said Fletcher shall be bound by the final award therein.

And it is further agreed by the said parties that if said arbitrator shall decease, or shall become incapacitated to act as arbitrator, then in that case the parties shall agree upon an arbitrator who shall take his place, and with all the power and authority herein submitted to the arbitrator herein named, and if the parties shall fail to agree to make such an appointment within thirty days from the decease or incapacity of said arbitrator, either party may apply to any Judge of the Supreme Court to appoint an arbitrator in the place of the arbitrator hereby appointed, who shall have all the powers and authority vested in the arbitrator herein named.

And it is further agreed that all the evidence hereinbefore
142 taken in said cause, either under the Commissioners appointed by the Court, or before the Master appointed in said cause, and the reports of said Master shall be submitted to said arbitrator, but the reports shall not have the same force and effect as the same would have had and received in a hearing before said Court, but they shall have only such effect, if any, as the arbitrator may see fit to give them, it being agreed that a judgment of the arbitrator shall be final upon all the questions of law and fact, except as hereinafter provided, and that any of said evidence which may be regarded by said arbitrator as inadmissible or incompetent, may be rejected by him.

And it is agreed that in the hearing of the questions submitted to the arbitrator he shall first pass upon the general question of liability or non-liability and announce his decision without taking any additional evidence; and in case he shall decide that a liability exists the parties shall have a reasonable time to produce evidence and determine the amount of said liability.

And when the final award shall be made by said arbitrator, either party may apply to said Court for a decree to enforce the same or the same may be enforced by a decree or judgment in any other court having jurisdiction of the parties. And the prevailing party shall be entitled to have a decree or judgment entered in any Court having jurisdiction over the party against whom such award may be made, in conformity with the award so made, as a judgment entered by consent which is hereby given.

Upon the final report of the arbitrator any questions of law except those arising upon the admissibility and weight of the evidence shall be reserved for the decision of the Court, upon the request of either party, and in this connection the Statutes and decisions of Michigan shall be admissible without other proof than the recognized books of

Statutes and reports, and any question arising thereon shall be
143 treated as a question of law and not of fact. The submission is to be made under a rule of this Court and not to operate as a discontinuance of said suit.

In witness whereof the parties hereto have set their hands and seals this fourth day of April, 1892.

(Signed)	GEO. N. FLETCHER.	[SEAL.]
(")	FRANCES M. BROWN.	[SEAL.]
(")	RUFUS H. SPALDING, *Administrator.*	[SEAL.]

(Agreement to Refer to Putnam.)

COMMONWEALTH OF MASSACHUSETTS.

Supreme Judicial Court.

RUFUS H. SPALDING, Adm'r,
vs.
GEORGE N. FLETCHER ET AL.

SUFFOLK, *ss:*

And now the parties appear and agree to refer this action to the determination of William L. Putnam, in accordance with the stipulation of the parties on file, a copy of which is hereto annexed (the previous reference to William C. Endicott having been revoked, upon motion of the parties). Pleadings may be amended or supplemented by any party; report to be made as soon as may be; judgment thereon to be final and execution to issue accordingly; and if either party neglects to appear on due notice, then the reference to proceed *ex parte*.

JOHN NOBLE, *Clerk.*

October 18, 1893.

144 EXHIBIT B.

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court. In Equity.

FRANCES M. BROWN, Administratrix,
vs.
GEORGE N. FLETCHER, Defendant.

To Hon. Michael O'Brien, Commissioner.

SIR: We are informed for the first time today, that all of the original exhibits offered in the above entitled cause and marked by you as Commissioner, are in your office but claimed by Albert W. Brown, Attorney for the Plaintiff, to be in his possession, and that

it is his intention to take them from your office and act in the capacity of custodian of the same and not to permit you to transmit the same together with the evidence taken by you to the Court in Boston which issued your commission. You are now here notified that the Defendant, his representatives and heirs at law, will hold you personally accountable for all such exhibits and they demand of you that you forthwith take, and hold possession of such papers, documents and exhibits until you shall be authorized lawfully to transmit the same to the Court as you are directed to do by the terms of your commission. The fact that the parties to this suit have, during this examination before you held certain of these exhibits on receipt, must in no way interfere with your duty in complying with the requirements of this demand.

These exhibits are at the time of this service upon you of this paper in your office, we advise you now that the said exhibits are of great importance and value to the Defendant, and his heirs
145 at law, and that we do not wish any person to hold or transmit them to the Court in Boston, Massachusetts, excepting yourself, in case any effort is made on the part of the Plaintiff, her attorneys or representatives to remove the same from your office you are hereby notified to take such steps and proceedings in any of the courts of this State which you may deem expedient, and the Defendant and his representatives will faithfully pay all necessary expenses incident to such proceedings. We only ask that you do your duty as Commissioner in respect to these exhibits, neither directly or impliedly has the Defendant, or any one for him sanctioned the transmission of these exhibits to the Court in Boston other than through your own hands, and if you fail to comply with the requirements of this demand, the Defendant and his heirs at law will hold you personally responsible for the results which may follow.

Dated November 9, 1899.

(S'g'd) CHARLES R. HENRY,
Attorney for Defendant and His Heirs and Representatives.

(On back:) No. 26. Eq. Supm. Jud. Ct. Spalding, adm., *v.* Fletcher & *als.* Now pet'n to [illegible]mons in executors, &c., of Defendant. Suffolk, *ss.* Supreme [illegible]icial Court. Filed Oct. 2, 1901. Attest: (Sgd.) C. H. Cooper, Ass't Clerk.

146 I urge no objection to the granting of the within petition.

(S'g'd) W. B. GRANT,
Att'y for Def't F. B. Cotton, Adm'r, with Will Annexed, Estate of Geo. N. Fletcher, Deceased.

DUDLEY A. DORR,
Boston, Mass.

(Order to Bring in Ex'r's, &c., of G. N. F.)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

No. 26.

SPALDING, Administrator,
vs.
FLETCHER ET ALS.

Decree.

On the Petition of Frances M. Brown now Plaintiff in said cause for the summoning of additional parties to defend this suit, filed October second, 1901.

It appearing to the court that upon an agreement of submission and reference between the defendant George N. Fletcher during his life and the plaintiff, dated April 4, 1892, and by a rule of this court, dated October 18, 1893, this cause was referred to the determination of William L. Putnam, and

It further appearing that during the lifetime of the said George N. Fletcher a report was made by said referee to this court that the plaintiff was entitled to an account, and thereupon hearings were had as to the amount due upon such accounting, and while
147 said hearings were in process the said defendant George N. Fletcher died, and that said George N. Fletcher was resident of Michigan and left three children, Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher and the last will and testament in which said Frank W. Fletcher and Allan M. Fletcher were named as executors has been probated in said Michigan, said executors have been duly qualified and that by said will and testament the said three children are residuary legatees and devisees of the said defendant George N. Fletcher, and

It further appearing that in the said agreement of submission and reference the said George N. Fletcher covenanted for his heirs and representatives that he would and his heirs, executors and administrators should faithfully fulfill and perform all the terms, & conditions of any award which may be made by said arbitrator or his substitute or successors, and it was covenanted by all the parties to said agreement of submission and reference that said agreement of submission and reference should forever settle all controversies between all of said parties and that the decease of any party should not revoke said agreement of submission but that said arbitration should continue and the successors of said Spalding and the legal representatives of said Brown and said Fletcher should be bound by the final award therein, and

It further appearing by said agreement of submission and reference that when the final award should be made by said arbitrator

either party might apply to the court for a decree to enforce the same, and the same might be enforced by a decree or judgment in any other court having jurisdiction of the parties, and that the prevailing party should be entitled to have a decree or judgment entered in the court having jurisdiction over the parties against
148 whom such award might be made in conformity with the award so made as a judgment entered by consent which was thereby given, and

It further appearing that by the terms of the rule referring the said cause to the said William L. Putnam, it was provided that if either party neglected to appear on due notice then the reference to proceed *ex parte*, and

It also appearing to the court that the counsel of record who represented said George N. Fletcher during his lifetime had withdrawn their appearance and no appearance had been since entered for his children or legal representatives except that an administrator with the will annexed had been appointed in the State of Massachusetts who has appeared and who has not objected to the granting of this petition, and

It further appearing in order that the hearings before said arbitrator may properly proceed and final decree be entered in this cause as contemplated by the said agreement of submission and reference that the said children of the said George N. Fletcher and his executors should be summoned in to defend this suit.

It is ordered that the said Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, children of the said George N. Fletcher and the said Frank W. Fletcher and Allan M. Fletcher, executors of the last will and testament of the said deceased George N. Fletcher, have until one month from the first Monday of October current, being the rule day next succeeding the date of this order to appear in said cause, and upon default of appearance by that date that this cause proceed before the arbitrator *ex parte* as to such parties.

(Sgd.) WILLIAM CALEB LORING,
Justice S. J. C.

Oct. 4, 1901.

149 (On back:) No. 26. S. J. Ct. Spalding, adm'r, *v.* Fletcher & *als.* Decree on pet'n for additional parties. Filed October 2nd, 1901. Dudley A. Dorr, Boston, Mass.

(Order to Bring in Ex'r's, &c., of G. N. F.)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

No. 26.

SPALDING, Administrator,
vs.
FLETCHER ET ALS.

Decree.

On the Petition of Frances M. Brown now Plaintiff in said cause for the summoning of additional parties to defend this suit, filed October second, 1901.

It appearing to the court that upon an agreement of submission and reference between the defendant George N. Fletcher during his life and the plaintiff, dated April 4, 1892, and by a rule of this court, dated October 18, 1893, this cause was referred to the determination of William L. Putnam, and

It further appearing that during the lifetime of the said George N. Fletcher a report was made by said referee to this court that the plaintiff was entitled to an account, and thereupon hearings were had as to the amount due upon such accounting, and while
147 said hearings were in process the said defendant George N. Fletcher died, and that said George N. Fletcher was resident of Michigan and left three children, Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher and the last will and testament in which said Frank W. Fletcher and Allan M. Fletcher were named as executors has been probated in said Michigan, said executors have been duly qualified and that by said will and testament the said three children are residuary legatees and devisees of the said defendant George N. Fletcher, and

It further appearing that in the said agreement of submission and reference the said George N. Fletcher covenanted for his heirs and representatives that he would and his heirs, executors and administrators should faithfully fulfill and perform all the terms, & conditions of any award which may be made by said arbitrator or his substitute or successors, and it was covenanted by all the parties to said agreement of submission and reference that said agreement of submission and reference should forever settle all controversies between all of said parties and that the decease of any party should not revoke said agreement of submission but that said arbitration should continue and the successors of said Spalding and the legal representatives of said Brown and said Fletcher should be bound by the final award therein, and

It further appearing by said agreement of submission and reference that when the final award should be made by said arbitrator

either party might apply to the court for a decree to enforce the same, and the same might be enforced by a decree or judgment in any other court having jurisdiction of the parties, and that the prevailing party should be entitled to have a decree or judgment entered in the court having jurisdiction over the parties against
148 whom such award might be made in conformity with the award so made as a judgment entered by consent which was thereby given, and

It further appearing that by the terms of the rule referring the said cause to the said William L. Putnam, it was provided that if either party neglected to appear on due notice then the reference to proceed *ex parte*, and

It also appearing to the court that the counsel of record who represented said George N. Fletcher during his lifetime had withdrawn their appearance and no appearance had been since entered for his children or legal representatives except that an administrator with the will annexed had been appointed in the State of Massachusetts who has appeared and who has not objected to the granting of this petition, and

It further appearing in order that the hearings before said arbitrator may properly proceed and final decree be entered in this cause as contemplated by the said agreement of submission and reference that the said children of the said George N. Fletcher and his executors should be summoned in to defend this suit.

It is ordered that the said Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, children of the said George N. Fletcher and the said Frank W. Fletcher and Allan M. Fletcher, executors of the last will and testament of the said deceased George N. Fletcher, have until one month from the first Monday of October current, being the rule day next succeeding the date of this order to appear in said cause, and upon default of appearance by that date that this cause proceed before the arbitrator *ex parte* as to such parties.

(Sgd.) WILLIAM CALEB LORING,
Justice S. J. C.

Oct. 4, 1901.

149 (On back:) No. 26. S. J. Ct. Spalding, adm'r, *v.* Fletcher & *als.* Decree on pet'n for additional parties. Filed October 2nd, 1901. Dudley A. Dorr, Boston, Mass.

(*Supplemental Order as to Service on Ex'r, &c., of G. N. F.*)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

RUFUS H. SPALDING, Adm'r,
vs.
GEORGE N. FLETCHER ET AL.

Supplemental Order.

In the above entitled cause, it is further ordered that the notice to be given to Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, children of George N. Fletcher, and to the said Frank W. Fletcher and Allan M. Fletcher, executors of the will of said George N. Fletcher by the order dated October 4, 1901, be given by serving each with a certified copy of said order fourteen days, at least, before the seventh day of November next.

By the Court,

C. H. COOPER,
Ass't Clerk.

October 10, 1901.

150 (On back:) 26. Eq. Spalding, adm'r, *v.* Fletcher *et al.* Sup'l Order.

(*Decree.*)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

No. 26.

SPALDING, Administrator,
vs.
FLETCHER ET ALS.

On the petition of Frances M. Brown now plaintiff in said cause for the summoning of additional parties to defend this suit, filed October second, 1901.

It appearing to the court that upon an agreement of submission and reference between the defendant George N. Fletcher during his life and the plaintiff, dated April 4, 1892, and by a rule of this court, dated October 18, 1893, this cause was referred to the determination of William L. Putnam, and

It further appearing that during the life-time of the said George N. Fletcher a report was made by said referee to this court that the plaintiff was entitled to an account, and thereupon hearings were had as to the amount due upon such accounting, and while said

hearings were in process the said defendant George N. Fletcher died, and that said George N. Fletcher was a resident of Michigan and left three children, Frank W. Fletcher, Allan M. Fletcher and
151 Grace Fletcher and the last will and testament in which said Frank W. Fletcher and Allan M. Fletcher were named as executors has been probated in said Michigan, said executors have been duly qualified and that by said will and testament the said three children are residuary legatees and devisees of the said defendant George N. Fletcher, and

It further appearing that in the said agreement of submission and reference the said George N. Fletcher convenanted for his heirs and representatives that he would and his heirs, executors and administrators should faithfully fulfill and perform all the terms & conditions of any award which may be made by said arbitrator or his substitute or successors, and it was covenanted by all the parties to said agreement of submission and reference that said agreement of submission and reference should forever settle all controversies between all of said parties and that the decease of any party should not revoke said agreement of submission but that said arbitration should continue and the successors of said Spalding and the legal representatives of said Brown and said Fletcher should be bound by the final award therein, and

It further appearing by said agreement of submission and reference that when the final award should be made by said arbitrator either party might apply to the court for a decree to enforce the same, and the same might be enforced by a decree or judgment in any other court having jurisdiction of the parties, and that the prevailing party should be entitled to have a decree or judgment entered in the court having jurisdiction over the parties against whom such award might be made in conformity with the award so made as a judgment entered by consent which was thereby given, and

It further appearing that by the terms of the rule referring the said cause to the said William L. Putnam, it was provided
152 that if either party neglected to appear on due notice then the reference to proceed *ex parte*, and

It also appearing to the court that the counsel of record who represented said George N. Fletcher during his lifetime had withdrawn their appearance and no appearance had been since entered for his children or legal representative- except that an administrator with the will annexed had been appointed in the State of Massachusetts who has appeared and who has not objected to the granting of this petition, and

It further appearing in order that the hearings before said arbitrator may properly proceed and final decree be entered in this cause as contemplated by the said agreement of submission and reference that the said children of the said George N. Fletcher and his executors should be summoned in to defend this suit,

It is ordered that the said Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, children of the said George N. Fletcher and the said Frank W. Fletcher and Allan M. Fletcher, executors of the last will and testament of the said deceased George N. Fletcher, have until one month from the first Monday of October current, being the

rule day next succeeding the date of this order to appear in said cause, and upon default of appearance by that date that this cause proceed before the arbitrator *ex parte* as to such parties.

WILLIAM CALEB LORING,
Justice S. J. C.

Oct. 4, 1901.

No. 26. S. J. Ct. Spalding, adm., *vs.* Fletcher *et als.*
153 Decree on Pet'n for Additional Parties filed October 2nd, 1901. Dudley A. Dorr, Boston, Mass.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

I, John Noble, clerk of said court, hereby certify that the foregoing is a true copy of the decree on the petition filed October 2, 1901, in the case of Rufus H. Spalding, adm'r, *vs.* George N. Fletcher *et als.*, now pending in said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this fifth day of October, A. D. 1901.

[SEAL.] JOHN NOBLE, *Clerk.*

(*Return of Service of Copies of Order on Ex'r's, &c.*)

STATE OF MICHIGAN, *County of Alpena, ss:*

WILLIAM T. JONES, being duly sworn, deposes and says that he is sheriff in and for said county; that on the 12th day of October, A. D. 1901, at the city of Alpena, in the County of Alpena and said State of Michigan, he personally served a true and certified copy of an order and decree of the Supreme Judicial Court, in Equity, for the County of Suffolk and Commonwealth of Massachusetts,
154 in the case of Spalding, administrator, *vs.* Fletcher, *et al.*, upon Frank W. Fletcher, by delivering said true and certified copy of the decree of said court to the said Frank W. Fletcher, personally, at the city of Alpena, in said County and State; that the hereto annexed is a true copy of the said decree so served by him as aforesaid and that the said Frank W. Fletcher is the same person named in the hereto annexed copy and is known to him to be such.

And further deponent saith not.

(Sgd.) WM. T. JONES, *Sheriff.*

Subscribed and sworn to before me this 18th day of October, A. D. 1901.

(Sgd.) CHAS. W. McLEAN,
Notary Public in and for Alpena County, Mich.

STATE OF MICHIGAN, *County of Alpena, ss:*

I, J. L. Currior Dep. Clerk of said County, and Clerk of the Circuit Court for the County of Alpena, which is a court of record, having a seal.

Do hereby certify, that Chas. W. McLean, whose name is subscribed to the Jurat of the annexed instrument, and therein written, was, at the time of taking such Jurat, a Notary Public, in and for said county, duly commissioned and qualified, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such notary public; and verily believe that the signature to the said Jurat is genuine.

155 I further certify, that said instrument is executed and acknowledged according to the laws of the state.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said Court and County, at Alpena, this 18th day of October, 1901, A. D.

[Seal of Circuit Court of Alpena Co., Michigan.]

(Sgd.) J. L. CURRIOR,
Dep. Clerk.

(On back:) No. 26. Eq. Spalding, adm., *vs.* Fletcher. Return of Service on Petition.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss.*

Supreme Judicial Court. In Equity.

No. 26.

SPALDING, Administrator,
vs.
FLETCHER ET ALS.

Decree.

On the Petition of Frances M. Brown now Plaintiff in said cause for the summoning of additional parties to defend this suit, filed October second, 1901.

It appearing to the court that upon an agreement of submission and reference between the defendant George N. Fletcher during his life and the plaintiff, dated April 4, 1892, and by a rule of this court, dated October 18, 1893, this cause was referred to the determination of William L. Putnam, and

It further appearing that during the life-time of the said George N. Fletcher a report was made by said referee to this court

156 that the plaintiff was entitled to an account, and thereupon hearings were had as to the amount due upon such accounting, and while said hearings were in process the said defendant George N. Fletcher died, and that said George N. Fletcher was a resident of Michigan and left three children, Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher and the last will and testament in which said Frank W. Fletcher and Allan M. Fletcher were named as executors has been probated in said Michigan, said executors have been duly qualified and that by said will and testament the

said three children are residuary legatees and devisees of the said defendant George N. Fletcher and

It further appearing that in the said agreement of submission and reference the said George N. Fletcher covenanted for his heirs and representatives that he would and his heirs, executors and administrators should faithfully fulfill and perform all the terms and conditions of any award which may be made by said arbitrator or his substitute or successor, and it was covenanted by all the parties to said agreement of submission and reference that said agreement of submission and reference should forever settle all controversies between all of said parties and that the decease of any party should not revoke said agreement of submission, but that said arbitration should continue and the successors of said Spalding and the legal representatives of said Brown and said Fletcher should be bound by the final award therein, and

It further appearing by said agreement of submission and reference that when the final award should be made by said arbitrator either party might apply to the court for a decree to enforce the same, and the same might be enforced by a decree or judgment in any other court having jurisdiction of the parties, and that the prevailing party should be entitled to have a decree or judgment
157 entered in the court having jurisdiction over the parties against whom such award might be made in conformity with the award so made as a judgment entered by consent which was thereby given, and

It further appearing that by the terms of the rule referring the said cause to the said William L. Putnam, it was provided that if either party neglected to appear on due notice then the reference to proceed *ex parte*, and

It also appearing to the court that the counsel of record who represented said George N. Fletcher during his lifetime had withdrawn their appearance and no appearance had been since entered for his children or legal representatives except that an administrator with the will annexed had been appointed in the State of Massachusetts who has appeared and who has not objected to the granting of this petition, and

It further appearing in order that the hearings before said arbitrator may properly proceed and final decree be entered in this cause as contemplated by the said agreement of submission and reference that the said children of the said George N. Fletcher and his executors should be summoned in to defend this suit,

It is ordered that the said Frank W. Fletcher, Allan M. Fletcher, and Grace Fletcher, children of the said George N. Fletcher, and the said Frank W. Fletcher and Allan M. Fletcher, executors of the last will and testament of the said deceased George N. Fletcher, have until one month from the first Monday of October current, being the rule day next succeeding the date of this order to appear in said cause, and upon default of appearance by that date that this cause proceed before the arbitrator *ex parte* as to such parties.

WILLIAM CALEB LORING,
Justice S. J. C.

Oct. 4, 1901.

158 (On back:) No. 26. S. J. Ct. Decree on Pet'n for Additional Parties Filed October 2nd, 1901. Dudley A. Dorr, Boston, Mass.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

I, John Nobel, Clerk of said Court, hereby certify that the foregoing is a true copy of the Decree on the petition filed October 2, 1901, in the case of Rufus H. Spalding, adm'r, *vs.* George N. Fletcher *et als.*, now pending in said Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this fifth day of October, A. D. 1901.

[SEAL.] JOHN NOBLE, *Clerk.*

(On back:) No. 26. Eq. Rufus H. Spalding, adm'r, *v.* George N. Fletcher *et als.*

Certificate.

STATE OF MICHIGAN, *County of Alpena, ss:*

WILLIAM T. JONES, being duly sworn, deposes and says that he is sheriff in and for said county; that on the 12th day of
159 October, A. D. 1901, at the City of Alpena, in the County of Alpena and said State of Michigan, he personally served a true and certified copy of an order and decree of the Supreme Judicial Court, In Equity, for the county of Suffolk and Commonwealth of Massachusetts, in the case of Spaulding, administrator, *vs.* Fletcher *et al.*, upon Frank W. Fletcher, one of the executors of the last will and testament of George N. Fletcher, deceased, by delivering said true and certified copy of the decree of said court to the said Frank W. Fletcher, personally, at the city of Alpena, in said County and State; that the hereto annexed is a true copy of the said decree so served by him as aforesaid and that the said Frank W. Fletcher is the same person named in the hereto annexed copy and is known to him to be such,

And further deponent saith not.

(Sgd.) WM. T. JONES, *Sheriff.*

Subscribed and sworn to before me this 18th day of October, A. D. 1901.

(Sgd.) CHAS. W. McLEAN,
Notary Public in and for Alpena County, Mich.

STATE OF MICHIGAN, *County of Alpena, ss:*

I, J. L. Currier Dep. Clerk of said County, and Clerk of the Circuit Court for the County of Alpena, which is a court of record having a seal.

Do hereby certify, that Chas. W. McLean whose name is subscribed to the Jurat of the annexed instrument, and therein written, was, at the time of taking such Jurat, a Notary Public, in and
160 for said county, duly commissioned and qualified, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such notary public; and verily believe that the signature to the Jurat is genuine.

I further certify, that said instrument is executed and acknowledged according to the laws of the State.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said Court and County, at Alpena, this 18th day of October, 1901, A. D.

[Seal of Circuit Court of Alpena Co., Michigan.]

(Sgd.) J. L. CURRIER,
Deputy Clerk.

(On back:) No. 26. Eq. Spalding, adm., *vs.* Fletcher. Return of service on petition.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

No. 26.

SPALDING, Administrator,
vs
FLETCHER ET ALS.

Decree.

On the petition of Frances M. Brown, now Plaintiff in said cause for the summoning of additional parties to defend this suit, filed October second, 1901.

It appearing to the court that upon an agreement of sub-
161 mission and reference between the defendant George N. Fletcher during his life and the plaintiff, dated April 4, 1892, and by a rule of this court, dated October 18, 1893, this cause was referred to the determination of William L. Putnam, and

It further appearing that during the lifetime of the said George N. Fletcher a report was made by said referee to this court that the plaintiff was entitled to an account, and thereupon hearings were had as to the amount due upon such accounting, and while said hearings were in process the said defendant George N. Fletcher died, and that said George N. Fletcher was a resident of Michigan and left three children, Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, and the last will and testament in which said Frank W. Fletcher and Allan M. Fletcher were named as executors has been probated in said Michigan, said executors have been duly qualified and that by said will and testament the said three children are resid-

uary legatees and devisees of the said defendant George N. Fletcher, and

It further appearing that in the said agreement of submission and reference the said George N. Fletcher covenanted for his heirs and representatives that he would and his heirs, executors and administrators should faithfully fulfill and perform all the terms, and conditions of any award which may be made by said arbitrator or his substitute or successors, and it was covenanted by all the parties to said agreement of submission and reference that said agreement of submission and reference should forever settle all controversies between all of said parties and that the decease of any party should not revoke said agreement of submission, but that said arbitration should continue and the successors of said Spalding and the legal representatives of said Brown and said Fletcher should be bound by the final award therein, and

162 It further appearing by said agreement of submission and reference that when the final award should be made by said arbitrator either party might apply to the court for a decree to enforce the same, and the same might be enforced by a decree or judgment in any other court having jurisdiction of the parties, and that the prevailing party should be entitled to have a decree or judgment entered in the court having jurisdiction over the parties against whom such award might be made in conformity with the award so made as a judgment entered by consent which was thereby given, and

It further appearing that by the terms of the rule referring the said cause to the said William L. Putnam, it was provided that if either party neglected to appear on due notice then the reference to proceed *ex parte*, and

It also apearing to the court that the counsel of record who represented said George N. Fletcher during his lifetime had withdrawn their appearance and no appearance had been since entered for his childr-n or legal representatives except that an administrator with the will annexed had been appointed in the State of Massachusetts who has appeared and who has not objected to the granting of this petition, and

It further appearing in order that the hearings before said arbitrator may properly proceed and final decree be entered in this cause as contemplated by the said agreement of submission and reference that the said children of the said George N. Fletcher and his executors should be summoned in to defend this suit,

It is ordered that the said Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, children of the said George N. Fletcher, and the said Frank W. Fletcher and Allan M. Fletcher, executors of the last will and testament of the said deceased George N. Fletcher,

163 have until one month from the first Monday in October current, being the rule day next succeeding the date of this order, to appear in said cause, and upon default of appearance by that date that this cause proceed before the arbitrator *ex parte* as to such parties.

WILLIAM CALEB LORING,

Oct. 4, 1901. *Justice, S. J. C.*

13—220

(On back:) No. 26. S. J. Ct. Spalding, adm'r, *vs.* Fletcher *et als.* Decree on Pet'n for Additional Parties, filed October 2nd, 1901. Dudley A. Dorr, Boston, Mass. Dudley A. Dorr.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

I, John Noble, Clerk of said Court, hereby certify that the foregoing is a true copy of the Decree on the petition filed October 2, 1901, in case of Rufus H. Spalding, adm'r, *vs.* George N. Fletcher *et als.* now pending in said Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this fifth day of October, A. D. 1901.

[SEAL.] JOHN NOBLE, *Clerk.*

164 (On back:) No. 26. Eq. Rufus H. Spalding, adm'r, *v.* George N. Fletcher, *et als.*

Certificate.

STATE OF MICHIGAN, *County of Alpena, ss:*

William T. Jones, being duly sworn, deposes and says that he is sheriff in and for said county; that on the 15th day of October, A. D. 1901, at the city of Alpena, in the County of Alpena and said State of Michigan, he personally served a true and certified copy of an order and decree of the Supreme Judicial Court, In Equity, for the County of Suffolk and Commonwealth of Massachusetts, in the case of Spalding, administrator, *vs.* Fletcher *et al.*, upon Allan M. Fletcher, by delivering said true and certified copy of the decree of said court to the said Allan M. Fletcher, personally, at the city of Alpena, in said County and State; that the hereto annexed is a true copy of the said decree so served by him as aforesaid and that the said Allan M. Fletcher is the same person named in the hereto annexed copy and is known to him to be such,

And further deponent saith not.

(Sgd.) WM. T. JONES, *Sheriff.*

Subscribed and sworn to before me this 18th day of October, A. D. 1901.

(Sgd.) CHAS. W. McLEAN,
Notary Public in and for Alpena Co., Mich.

165 STATE OF MICHIGAN, *County of Alpena, ss:*

I, J. L. Currier, Dep. Clerk of said County, and Clerk of the Circuit Court for the County of Alpena, which is a court of record, having a seal.

Do Hereby Certify, That Chas. W. McLean, whose name is subscribed to the Jurat, of the annexed instrument, and therein written,

was, at the time of taking such Jurat, a notary public, in and for said county, duly commissioned and qualified, and duly authorized to take the same. And further, That I am well acquainted with the handwriting of such notary public; and verily believe that the signature to the said Jurat is genuine.

I further certify, That said instrument is executed and acknowledged according to the laws of the State.

In Testimony Whereof, I have hereunto set my hand, and affixed the seal of said Court and County, at Alpena, this 18th day of October 1901, A. D.

[Seal of Circuit Court of Alpena Co., Michigan.]

(Sgd.) J. L. CURRIER, *Dep. Clerk.*

(On back:) No. 26. Eq. Spalding, adm'r, *vs.* Fletcher. Return of service on petition.

166 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

No. 26.

SPALDING, Administrator,
vs.
FLETCHER ET ALS.

Decree.

On petition of Frances M. Brown, now Plaintiff in said cause for the summoning of additional parties to defend this suit, filed October second, 1901.

It appearing to the court that upon an agreement of submission and reference between the defendant George N. Fletcher during his life and the plaintiff, dated April 4, 1892, and by a rule of this court, dated October 18, 1893, this cause was referred to the determination of William L. Putnam, and

It further appearing that during the lifetime of the said George N. Fletcher a report was made by said referee to this court that the plaintiff was entitled to an account, and thereupon hearings were had as to the amount due upon such accounting, and while said hearings were in process the said defendant George N. Fletcher died, and that said George N. Fletcher was a resident of Michigan and left three children, Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, and the last will and testament in which said Frank W. Fletcher and Allan M. Fletcher were named as executors has been probated in said Michigan, said executors have been duly qualified and
167 that by said will and testament the said three children are residuary legatees and devisees of the said defendant George N. Fletcher, and

It further appearing that in the said agreement of submission and reference the said George N. Fletcher covenanted for his heirs and

representatives that he would and his heirs, executors and administrators should faithfully fulfill and perform all the terms and conditions of any award which may be made by said arbitrator or his substitute or successors, and it was covenated by all the parties to said agreement of submission and reference that said agreement of submission and reference should forever settle all controversies between all of said parties and that the decease of any party should not revoke said agreement of submission, but that said arbitration should continue and the successors of said Spalding and the legal representatives of said Brown and said Fletcher should be bound by the final award therein, and

It further appearing by said agreement of submission and reference that when the final award should be made by said arbitrator either party might apply to the court for a decree to enforce the same, and the same might be enforced by a decree or judgment in any other court having jurisdiction of the parties, and that the prevailing party should be entitled to have a decree or judgment entered in the court having jurisdiction over the parties against whom such award might be made in conformity with the award so made as a judgment entered by consent which was thereby given, and

It further appearing that by the terms of the rule referring the said cause to the said William L. Putnam, it was provided that if either party neglected to appear on due notice then the reference to proceed *ex parte*, and

It also appearing to the court that the counsel of record who
168 represented said George N. Fletcher during his lifetime had withdrawn their appearance and no appearance had been since entered for his children or legal representafives except that an administrator with the will annexed had been appointed in the State of Massachusetts who has appeared and who has not objected to the granting of this petition, and

It further appearing in order that the hearings before said arbitrator may properly proceed and final decree be entered in this cause as contemplated by the said agreement of submission and reference that the said children of the said George N. Fletcher and his executors should be summoned in to defend this suit,

It is ordered that the said Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, children of the said George N. Fletcher, and the said Frank W. Fletcher and Allan M. Fletcher, executors of the last will and testament of the said deceased George N. Fletcher, have until one month from the first Monday in October current, being the rule day next succeeding the date of this order, to appear in said cause, and upon default of appearance by that date that this cause proceed before the arbitrator *ex parte* as to such parties.

WILLIAM CALEB LORING,
Justice, S. J. C.

Oct. 4, 1901.

(On back:) No. 26. S. J. Ct. Spalding, admr., *vs.* Fletcher *et als.* Decree on pet'n for additional parties. Filed October 2nd, 1891. Dudley A. Dorr, Boston, Mass.

169 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

I, John Noble, Clerk of said Court, hereby certify that the foregoing is a true copy of the Decree on the petition filed October 2, 1901, in the case of Rufus H. Spalding, Adm'r, *vs.* George N. Fletcher, *et als.* now pending in said Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this fifth day of October, A. D. 1901.

[SEAL.] JOHN NOBLE, *Clerk.*

(On back:) No. 26. Eq. Rufus H. Spalding, adm. *v.* George N. Fletcher *et al.* Certificate.

STATE OF MICHIGAN, *County of Alpena, ss:*

William T. Jones, being duly sworn, deposes and says that he is sheriff in and for said county; that on the 15th day of October, A. D. 1901, at the city of Alpena, in the County of Alpena and said State of Michigan, he personally served a true and certified copy of an order and decree of the Supreme Judicial Court, In Equity, for the County of Suffolk and Commonwealth of Massachusetts, in the case
170 of Spaulding, administrator, *vs.* Fletcher *et al.*, upon Allan M. Fletcher, one of the executors of the last will and testament of George N. Fletcher, deceased, by delivering said true and certified copy of said decree of said court to the said Allan M. Fletcher, personally, at the city of Alpena, in said County and State; that the hereto annexed is a true copy of the said decree so served by him as aforesaid, and that the said Allan M. Fletcher is the same person named in the hereto annexed copy and is known to him to be such.

And further deponent saith not.

(Sgd.) WM. T. JONES, *Sheriff.*

Subscribed and sworn to before me this 18th day of October, A. D. 1901.

(Sgd.) CHAS. W. McLEAN,
Notary Public in and for Alpena County, Mich.

STATE OF MICHIGAN, *County of Alpena, ss:*

I, J. L. Currier, Dep. Clerk of said County, and Clerk of the Circuit Court for the County of Alpena, which is a court of record, having a Seal.

Do Hereby Certify, That Chas. W. McLean, whose name is subscribed to the Jurat, of the annexed instrument, and therein written, was, at the time of taking such Jurat, a Notary Public, in and for said county, duly commissioned and qualified, and duly authorized to take the same. And further, That I am well acquainted with the handwriting of such notary public; and verily believe that the signature to the said Jurat is genuine.

171 I further certify, That said instrument is executed and acknowledged according to the laws of the State.

In Testimony Whereof, I have hereunto set my hand, and affixed the seal of said Court and County, at Alpena, this 18th day of October 1901, A. D.

[Seal of Circuit Court of Alpena Co., Michigan.]

(Sgd.) J. L. CURRIER,
Dep. Clerk.

(On back:) No 26. Eq. Spalding, adm'r, *vs.* Fletcher. Return of service on petition.

STATE OF MICHIGAN, *County of Wayne, ss:*

John V. Trollope, being duly sworn, deposes and says that he is a Deputy Sheriff in and for the said County of Wayne and State of Michigan, and that on the twenty-third day of October, A. D. 1901, at the City of Detroit, in said County, he served the within Decree on Grace Fletcher, now Grace Fletcher King, one of the persons named therein, by delivering to said Grace Fletcher as aforesaid, personally, a true copy thereof.

Fees, $1.50.

(Sgd.) JOHN V. TROLLOP.

Subscribed and sworn to before me this twenty-third day of October, A. D. 1901.

(Sgd.) ELTON G. DOUGLASS,
Notary Public, Wayne County, Mich.

No. 310. Notarial Jurat.

STATE OF MICHIGAN, *County of Wayne, ss:*

I, Wiliam H. McGregor, Clerk of said County, and Clerk
172 of the Circuit Court for the County of Wayne, which is a Court of Record having a seal.

Do Hereby Certify that Elton G. Douglass whose name is subscribed to the Jurat of the annexed instrument, and therein written, was at the time of taking such Jurat, a Notary Public in and for said County, duly commissioned and qualified, and duly authorized to take the same. And, further, That I am well acquainted with the handwriting of such Notary Public, and verily believe that the Signature to the said Jurat is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court and County, at Detroit, this 23rd day of October, A. D. 1901.

[Seal of the Circuit Court of Wayne County, Michigan.]

(Sgd.) WM. H. McGREGOR, *Clerk.*
By JOHN R. FISHER,
Deputy Clerk.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

No. 26.

SPALDING, Administrator,
vs.
FLETCHER ET ALS.

Decree.

On the Petition of Frances M. Brown now Plaintiff in said cause for the summoning of additional parties to defend this suit, filed October second, 1901.

173 It appearing to the court that upon an agreement of submission and reference between the defendant George N. Fletcher during his life and the plaintiff, dated April 4, 1892, and by a rule of this court, dated October 18, 1893, this cause was referred to the determination of William L. Putnam, and

It further appearing that during the life-time of the said George N. Fletcher a report was made by said referee to this court that the plaintiff was entitled to an account, and thereupon hearings were had as to the amount due upon such accounting, and while said hearings were in process the said defendant George N. Fletcher died, and that said George N. Fletcher was a resident of Michigan and left three children, Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher and the last will and testament in which said Frank W. Fletcher and Allan M. Fletcher were named as executors has been probated in said Michigan, said executors have been duly qualified and that by said will and testament the said three children are residuary legatees and devisees of the said defendant George N. Fletcher, and

It further appearing that in the said agreement of submission and reference the said George N. Fletcher covenanted for his heirs and representatives that he would and his heirs, executors and administrators should faithfully fulfill and perform all the terms and conditions of any award which may be made by said arbitrator or his substitutes or successors, and it was covenanted by all the parties to said agreement of submission and reference that said agreement of submission and reference should forever settle all controversies between all of said parties and that the decease of any party should not revoke said agreement of submission but that said arbitration should continue and the successors of said Spalding and the legal representatives of said Brown and said Fletcher should be bound by the final award therein, and

174 It further appearing by said agreement of submission and reference that when the final award should be made by said arbitrator either party might apply to the court for a decree to enforce the same, and the same might be enforced by a decree or judgment in any other court having jurisdiction of the parties, and that

the prevailing party should be entitled to have a decree or judgment entered in the court having jurisdiction over the parties against whom such award might be made in conformity with the award so made as a judgment entered by consent which was thereby given, and

It further appearing that by the terms of the rule referring the said cause to the said William L. Putnam, it was provided that if either party neglected to appear on due notice then the reference to proceed *ex parte*, and

It also appearing to the court that the counsel of record who represented said George N. Fletcher during his life-time had withdrawn their appearance and no appearance had been since entered for his children or legal representatives except that an administrator with the will annexed had been appointed in the State of Massachusetts who has appeared and who has not objected to the granting of this petition and

It further appearing in order that the hearings before said arbitrator may properly proceed and final decree be entered in this cause as contemplated by the said agreement of submission and reference that the said children of the said George N. Fletcher and his executors should be summoned in to defend this suit,

It is ordered that the said Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, children of the said George N. Fletcher, and the said Frank W. Fletcher and Allan M. Fletcher, executors of the last will and testament of the said deceased George N. Fletcher, have until one month from the first Monday of October current,
175 being the rule day next succeeding the date of this order to appear in said cause, and upon default of appearance by that date that this cause proceed before the arbitrator *ex parte* as to such parties.

WILLIAM CALEB LORING,
Oct. 4, 1901. *Justice, S. J. C.*

(On back:) No. 26. S. J. Ct. Spalding, adm., *vs.* Fletcher *et als.* Decree on pet'n for additional parties. Filed October 2nd, 1901. Dudley A. Dorr, Boston, Mass.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

I, John Noble, Clerk of said Court, hereby certify that the foregoing is a copy of the Decree on the petition filed October 2, 1901, in the case of Rufus H. Spalding, Adm'r, *vs.* George N. Fletcher *et als.*, now pending in said Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this fifth day of October, A. D. 1901.

[SEAL.] JOHN NOBLE, *Clerk.*

176 (On back:) 26. Eq. Spalding, Ad., *vs.* George N. Fletcher. Return of service on Grace Fletcher, Oct'r 3rd, 1901. Dudley A. Dorr, 68 Pemberton Sq.

(*Order of Default and Direction to Proceed Ex Parte.*)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

SPALDING, Adm.,
vs.
FLETCHER ET ALS.

Due and sufficient service having been made upon Frank W. Fletcher, Allan M. Fletcher, individually and as executors of the will of George N. Fletcher and Grace Fletcher of notice of the order made and entered in this suit on the fourth day of October, 1901, and proof of the same being now on file; and it satisfactorily appearing to the Court that neither of said above named persons have caused any appearance to be entered in this suit; and it further appearing that the time limited for the entry of such appearance has expired;

On motion of the plaintiff's attorney it is ordered that the default of the said Frank W. Fletcher, Allan M. Fletcher, individually and as executors of the will of George N. Fletcher, and Grace Fletcher for such non-appearance be, and the same is hereby entered; and

177 It is further ordered that Hon. William L. Putnam, the Arbitrator in this cause, be, and he is hereby authorized and directed to proceed *ex parte* in accordance with the terms of the order of this court of said date above referred to.

By the Court,
(Signed) JOHN NOBLE, *Clerk.*

January 24, 1902.

(On back:) No. 26. Eq. Supreme Jud. Ct. Spalding adm'r, *v.* Fletcher & *als.* Order of court.

(*Substitution of Albert W. Brown as Compl't.*)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

SPAULDING, Adm'r,
v.
FLETCHER.

Now comes Albert W. Brown and represents that Frances M. Brown, administratrix *de bonis non* of the estate of William White, a party to the above entitled action, has deceased, and that he, said

Albert W. Brown, has been duly appointed and qualified by, and given bond to the satisfaction of the Probate Court for the County of Suffolk, and thereupon letters have been issued to him by said Court as administrator *de bonis non* of the estate of said William White.

And he prays leave to intervene in the above entitled action
178 in the place of said Frances M. Brown, administratrix *de bonis*, deceased.

(Sgd.) ALBERT W. BROWN,
Administrator de Bonis Non.

(On back:) 26. Eq. Supreme Judicial Court. In Equity. Spaulding adm'r, *v.* Fletcher. Motion of administrator *de bonis* for leave to intervene. Suffolk, *ss.* Supreme Judicial Court. Filed Dec. 30, 1902. Attest: (Sgd.) C. H. Cooper, ass't clerk. (Sgd.) Allowed, per Loring, J.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

SPAULDING, Adm'r,
v.
FLETCHER.

Now comes Albert W. Brown and represents that Frances M. Brown, a party to said action, did decease on the 3rd day of December, A. D. 1902, testate; and that by her will he was designated as executor of her said will and has been duly appointed and qualified by, and given bonds to the satisfaction of the Probate Court of said County of Suffolk, and letters testamentary have issued to him as executor of said will.

179 And he prays leave to intervene in the place of said Frances M. Brown.

(S'g'd) ALBERT W. BROWN, *Executor.*

(On back:) 26. Eq. Supreme Judicial Court. In equity. Spaulding, adm'r, *v.* Fletcher. Motion of Albert W. Brown, executor of Frances M. Brown, for leave to intervene. Suffolk, *ss.* Supreme Judicial Court. Filed Dec. 30, 1902. Attest: (Sgd.) C. H. Cooper, ass't clerk. (Sig.) Allowed, per Loring, J.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

SPALDING, Adm'r,
v.
FLETCHER.

Now comes Albert W. Brown and represents that Frances M. Brown, a party to the above entitled action, did decease on the 3rd

day of December, A. D. 1902, testate; and that her will has been duly allowed by, and letters testamentary thereon have been issued to said Albert W. Brown by the Probate Court for the County of Suffolk, and bonds satisfactory to said Court have been duly filed by him and allowed; and that by said will he was made sole legatee and devisee of the estate of said Frances M.; and further that
180 a part of said estate consists of lands and interests in and rights of action for lands in the State of Michigan in controversy in said action—

Wherefore he prays for leave to intervene in and become party to said action in the place of said Frances, as devisee under said will, to such extent as his interest as devisee requires.

(S'g'd) ALBERT W. BROWN.

(On back:) 26. Eq. Supreme Judicial Court. In equity. Spaulding, adm'r, *v.* Fletcher. Motion of Albert W. Brown for leave to intervene. Suffolk, *ss.* Supreme Judicial Court. Filed Dec. 30, 1902. Attest: (Sgd.) C. H. Cooper, ass't clerk. (Sgd.) Allowed per Loring, J.

(Final Award of Arbitrator.)

This is the triplicate to be deposited with the Supreme Judicial Court for Suffolk County, State of Massachusetts.

(S'g'd) W. L. PUTNAM.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING, Administrator,
v.
GEORGE N. FLETCHER ET AL.

181 Pursuant to the agreement signed by George N. Fletcher, Frances M. Brown and Rufus H. Spalding, Administrator, dated the fourth day of April, eighteen hundred and ninety-two, the entry made in the foregoing cause of Rufus H. Spalding, administrator, against George N. Fletcher, *et al.*, under date of the eighteenth day of October, eighteen hundred and ninety-three, and the agreement signed "Geo. Wm. Estabrook, for Mrs. Frances M. Brown, Administratrix, and individually," and "J. Lowell for defendant Fletcher," dated Boston, March second, eighteen hundred and ninety-four, copies of which are attached to the award made by William L. Putnam herein under date of April twenty-seventh, eighteen hundred and ninety-four, to which this award is supplemental, I, William L. Putnam, of Portland, in the State of Maine, make, publish and declare in duplicate this, my award, supplementing the award — aforesaid made by me in this cause under date of the twenty-seventh day of April, eighteen hundred and ninety-four, and completing all matters and things to be done by me as arbitrator, or

otherwise, pursuant to all the agreements, entries and award aforesaid.

Subsequent to the award aforesaid, made by me, said Putnam, under date of April twenty-seventh, eighteen hundred and ninety-four, sundry proceedings in connection with, and preparatory to, the matters disposed of in this, my said supplemental award, were taken cognizance of by me, said Putnam, as arbitrator, with reference to which, and in the conduct of which, said George N. Fletcher appeared before me personally, and, also, by his counsel and attorney, Frank N. Nay, the details of which it is not necessary that I should set forth, except that all the same were in anticipation of, and in preparation for, a supplemental and final hearing before me as arbitrator, pursuant to the matters hereinbefore set out, and resulting in this award; but, pending the same, said George N. Fletcher deceased on the fifth day of November, eighteen hundred and ninety-nine; and, thereupon, the Probate Court for the County of Middlesex, in the Commonwealth of Massachusetts, constituted and appointed Frank B. Cotton, of Brookline, in the County of Norfolk and Commonwealth of Massachusetts, Administrator with the will annexed of the goods and *and* estate of said George N. Fletcher within said Commonwealth, and issued letters of administration accordingly to said Frank B. Cotton, all in accordance with its decree entered on the sixth day of March, nineteen hundred: and, thereafterwards, the death of said George N. Fletcher was duly suggested in this cause, and the said Frank B. Cotton, as such Administrator, appeared as a party defendant therein.

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And, thereafterwards, during the proceedings hereinafter set out, Frances M. Brown, who had, previous to the award to which this is a supplement, been duly appointed by the Probate Court for the County of Suffolk and Commonwealth of Massachusetts, Administratrix of the goods and estate of William White, in lieu of said Rufus H. Spalding, and who had been allowed to appear, and had appeared, in this cause as party plaintiff, Administratrix, in lieu of said Rufus H. Spalding, Administrator, deceased on the third day of December, nineteen hundred and two, and her husband, Albert W. Brown, was, thereafterward, on the twenty-sixth day of December, nineteen hundred and two, duly appointed and qualified by the Probate Court for said County of Suffolk, Administrator of the goods and estate of said William White, as successor to said Frances M. Brown, as such Administratrix; and further, thereafterwards, on the twenty-sixth day of December, nineteen hundred and two, the will of said Frances M. Brown was duly allowed and established by said Probate Court for the County of Suffolk, and said Albert W. Brown was duly appointed and qualified Executor thereof; and further, thereafterwards, on the thirtieth day of December, nineteen hundred and two, said Albert W. Brown was allowed to appear, and did appear in the cause aforesaid, as Administrator of the goods and estate of said William White, as Executor of said Will of said Frances M. Brown, and individually as sole devisee and legatee under said will.

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Subsequent to the proceedings preliminary and preparatory al-

ready referred to, on the eleventh day of March, nineteen hundred and two, at half past two o'clock in the afternoon, at twenty-seven School Street in the City of Boston, and State of Massachusetts, I, said William L. Putnam, as such arbitrator, commenced the hearing of all the parties in interest, with reference to the subject matter of this supplemental award, having given due and reasonable notice thereof, and of the time and place of commencing said hearing, to said Frances M. Brown, individually and as Administratrix of the goods and estate of said William White, to Frank B. Cotton, Administrator, as aforesaid, of the goods and estate of George N. Fletcher, to Mrs. Grace King, wife of Charles B. King, of Detroit, in the State of Michigan, and to Frank W. Fletcher and Allan M. Fletcher, each of Alpena, in the State of Michigan, said Grace King, Frank W. Fletcher and Allan M. Fletcher being all the children, and the devisees and legatees of said George N. Fletcher, and said Frank W. Fletcher and Allan M. Fletcher being the Executors of the Will of said George N. Fletcher, appointed and qualified as such by the Court, at the domicil- of said George N. Fletcher having jurisdiction of the probate of said Will, and the appointment and qualification of the Executors thereof, at the place of said domicil-.

At the time and place appointed as aforesaid, to wit, at twenty-seven School Street, in the City of Boston aforesaid, at half-past two o'clock in the afternoon of said eleventh day of March, nine-
184 teen hundred and two, I, said William L. Putnam, was there present as arbitrator aforesaid, prepared to hear the parties aforesaid; or any other parties in interest, and proceeded to the determination of matters to be determined by me as such arbitrator, and to complete my determination and award herein.

There were present at the time and place aforesaid said Frances M. Brown, individually and as administratrix aforesaid, and her counsel, and, also, said Frank B. Cotton, Administrator as aforesaid, and his counsel.

Said hearing continued from time to time, by regular adjournments, at said twenty-seven School Street, to and including the twentieth day of January, nineteen hundred and three, during which period, at said various adjournments, I, said William L. Putnam, as such arbitrator, heard the parties, their proofs, and the arguments of their counsel, and, having heard all the same, I, as such arbitrator, do determine, adjudge and award as follows:

I hereby determine, adjudge and award that my aforesaid award dated on the twenty-seventh day of April, eighteen hundred and ninety-four, should be and the same is, hereby reaffirmed, and that neither at the time of the decease of said George N. Fletcher, nor at any other time, was there, or is there now, any balance due him, said Fletcher, or his estate, from said Frances M. Brown individually, or as Administratrix, or from said Albert W. Brown individually, or as Administrator, or Executor, or from any other person according to article second of my said previous award; and that, therefore, said George N. Fletcher was holden to convey, and should have conveyed, to said Frances, as sole heir of said White, her heirs and assigns, to her and their use forever, one-fourth part in common of all

the interests acquired by him, said Fletcher, as particularly set out in said article second, said conveyance to be made as therein
185 set out: and that said Albert W. Brown, as devisee of said Frances M. Brown, or whosoever may be in privity of title with said Frances M. Brown, is now entitled to such conveyance, and the heirs, devisees, legatees, executors, and other representatives of said George N. Fletcher, are now holden to convey to him, said Albert W. Brown, or other persons in privity with said Frances, to hold to him or them, his or their heirs and assigns, for his or their use forever, all said one-fourth part in accordance with said article second.

And further, in pursuance of said agreements hereinbefore set out, I, said William L. Putnam as such arbitrator, do determine, adjudge and award that the liability of said George N. Fletcher referred to therein, and to be determined by me as such arbitrator, amounted at his decease, to wit, on the fifth day of November, eighteen hundred and ninety-one, to said Frances M. Brown as Administratrix of the goods and estate of said William White, to thirty-three thousand, one hundred and eighteen dollars and ninety-three cents: and further, in pursuance of said agreements and entry, I, said William L. Putnam, as such arbitrator, do further determine, adjudge and award, that the liability aforesaid to said Frances M. Brown amounted on said fifth day of November, eighteen hundred and ninety-nine, at the death of said George N. Fletcher to three hundred fourteen thousand sixty-seven dollars and twenty-two cents.

And I, said William L. Putnam, as such arbitrator, having computed interest on the principal sums making part of the amounts above awarded, from said fifth day of November, eighteen hundred and ninety-nine, to the fifth day of February, nineteen hundred and three, the date of this award, do further, in accordance with said agreements, determine, adjudge and award that the liability aforesaid, from the estate of said George N. Fletcher, his administrator and executors, to said Albert W. Brown, as administrator of
186 the estate of said William White, on and as of said fifth day of February, nineteen hundred and three, is thirty-five thousand, six hundred and sixty-nine dollars and sixty-three cents.

And further, having computed interest as aforesaid, I, said William L. Putnam, as such arbitrator to determine, adjudge and award, in accordance with said agreements and entry, that the liability aforesaid from the estate of said George N. Fletcher, his administrator and executors, to said Albert W. Brown, as executor of the will of said Frances M. Brown, as and of said fifth day of February, nineteen hundred and three, is three hundred and forty-seven thousand, two hundred and twenty-five dollars and eleven cents.

And further, in pursuance of said agreement and entry, I, said William L. Putnam, as such arbitrator, do determine, adjudge and award that said Albert W. Brown, as administrator of the goods and estate of said William White, is entitled to recover from the administrator and executors of said George N. Fletcher, or either of them, as the case may be, said sum of thirty-three thousand, one hundred

eighteen dollars and ninety-three cents, the amount due as aforesaid, from said George N. Fletcher on said fifth day of November, eighteen hundred and ninety-nine, to said Frances M. Brown, as administratrix of the goods and estate of said William White, with interest as aforesaid to said fifth day of February, nineteen hundred and three, amounting in all to the sum of thirty-five thousand, six hundred sixty-nine dollars and sixty-three cents, and, also, that said Albert W. Brown, as executor of the will of said Frances M. Brown, is entitled to recover from the estate of said George N. Fletcher, his administrator or executors, or either of them, as the case may be, said sum of three hundred fourteen thousand, sixty-seven dollars
187 and twenty-two cents, the amount due as aforesaid from said George N. Fletcher to said Frances M. Brown, on said fifth day of November, eighteen hundred and ninety-nine, with interest as aforesaid to said fifth day of February, nineteen hundred and three, amounting in all to the sum of three hundred forty-seven thousand, two hundred twenty-five dollars and eleven cents.

And I, said William L. Putnam, as such arbitrator, do further, in pursuance of said agreements, determine, adjudge and award that said administrator and executors of George N. Fletcher, and each or either of them, shall forthwith pay to said Albert W. Brown, as such administrator of the goods and estate of William White aforesaid, said sum of thirty-three thousand one hundred eighteen dollars and ninety-three cents, with interest as aforesaid from said fifth day of November, eighteen hundred and ninety-nine, to said fifth day of February, nineteen hundred and three, amounting in all to the sum of thirty-five thousand, six hundred sixty-nine dollars and sixty-three cents, and to said Albert W. Brown, as executor of the will of said Frances M. Brown, said sum of *three hundred fourteen thousand, sixty-seven dollars and twenty-two cents*, with interest as aforesaid from said fifth day of November, eighteen hundred and ninety-nine to said fifth day of February, nineteen hundred and three, amounting in all to the sum of *three hundred forty-seven thousand, two hundred twenty-five dollars and eleven cents*.

And, Whereas, in the amounts awarded as aforesaid against said George N. Fletcher, his administrator and executors, are included certain sums which said George N. Fletcher received for the sales of certain lots, being parts of the pine lands described in article third of the award of said William L. Putnam, dated April twenty-seventh, eighteen hundred and ninety-four, so that, without reference to the question whether or not said George N. Fletcher could, without the consent of said William White, or said Frances M. Brown,
188 give a clear title to the same, the parties plaintiff herein may be equitably estopped from making any claim thereto:

Now, Therefore, in order to indicate what lots and parcels are thus included in this award, I have prefixed to the amended account filed before me by said Frances M. Brown, in her individual right and as administratrix, a statement as follows:

"COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING, Administrator,
vs.
GEORGE N. FLETCHER ET AL.

This book, marked as follows: 'Spalding, Adm'r *v.* Fletcher. Ex. No. 66, June 19, 1902. Walter Rogers, Stenographer,' is the amended account of the plaintiff, Frances M. Brown, in her individual right and as administratrix, produced before William L. Putnam, Arbitrator, in the foregoing cause, at the final hearing before him as such arbitrator. The pages in this book headed: 'Stumpage. Pine land descriptions,' refer to stumpage claimed to have been sold by George N. Fletcher from the pine lands owned by him in common with Mr. White, according to article third of the preliminary award of said Putnam, made under date of April 27, 1894. The entries on the left-hand halves of the pages represent the claim as made by the parties plaintiff relative to the lands aforesaid, while the entries on the right-hand halves of said pages are stated
189 by the parties plaintiff to represent certain credits appearing in the accounts and books of George N. Fletcher.

The entries on the left hand halves of said several pages were made use of by said Putnam, as such arbitrator, in fixing the several amounts allowed by him in his final award. Those entries cover not only stumpage, but certain lots or parcels sold out of said lands by said George N. Fletcher, so that, so far as the arbitrator has awarded the same to the parties plaintiff in the final award,—the parties plaintiff are estopped from claiming the lots or parcels themselves.

The various items so contained in said left hand halves of said several pages against which nothing appears to show that the amounts represent stumpage, are proceeds of lots or parcels sold as aforesaid; so that, so far as all the same are concerned, the parties plaintiff are estopped from making any claim to the lots or parcels themselves against the purchasers of those in privity with them.

(Signed) WILLIAM L. PUTNAM."

I, said William L. Putnam, as such arbitrator, have, also, directed that said amended account, being described as Exhibit No. 66 as aforesaid, should be deposited in the Supreme Judicial Court, for the County of Suffolk, in the cause to which this award appertains, to be there preserved for the benefit of all parties concerned, and for the protection of their several interests.

I, said William L. Putnam, as such arbitrator, further determine, adjudge and award that said award, dated April twenty-seventh, eighteen hundred and ninety-four, and this award supplemental thereto, cover, determine and dispose of all matters and things submitted to me by virtue of any agreements aforesaid, or by virtue of any other matter or thing whatsoever.

All the books and papers which have come into my pos-
190 session I have directed Mr. George P. Ayres, messenger of the Circuit Court of Appeals for the First Circuit, as representing me, to deliver into the office of the Clerk of the Supreme Judicial Court, for the County of Suffolk and Commonwealth of Massachusetts.

My charges as arbitrator under the supplemental award, for my own services, are —— dollars, and for my disbursements, including payments of traveling expenses, stenographers, accountants, and messengers having charge of books and papers, are —— dollars, according to the memorandum attached hereto.

The disbursements of the plaintiffs in this case which, according to the laws of the State of Massachusetts, are taxable as costs in favor of the prevailing party, are —— dollars, according to the memorandum attached hereto.

So far as it remains in the power of myself, said William L. Putnam, as arbitrator, to determine the same, I determine, adjudge and award that the plaintiffs recover from the estate of said George N. Fletcher, his administrator and executors, as the case may be, all sums paid by the plaintiffs to me as arbitrator, either under this award, or the award supplemental thereto, and, also, their disbursements, amounting to —— dollars, according to the memorandum attached hereto, and that the same be paid to, received and apportioned as follows:

Said Albert W. Brown, as administrator of the estate of said William White, and said Albert W. Brown as Executor of the Will of said Frances M. Brown, shall receive the same in his two several capacities *pro rata* for the amounts herein awarded to him in his said several capacities.

Dated at Boston, in the Commonwealth of Massachusetts
191 this fifth day of February, nineteen hundred and three.

WILLIAM L. PUTNAM, *Arbitrator.*

BOSTON, *January* 20, 1903.

To whom it may concern:

Having notified all parties interested to attend at Room sixteen, number twenty-seven School Street, Boston, Massachusetts, on this, the twentieth day of January, nineteen hundred and three, at three o'clock in the afternoon, to examine the foregoing draft of my award in the case of Rufus H. Spalding, Administrator, *vs.* George N. Fletcher, I hereby at the time and place named in said notice, to wit, at Room sixteen, twenty-seven School Street, Boston, Massachusetts, on Tuesday, the twentieth day of January, nineteen hundred and three, at three o'clock in the afternoon, submit the foregoing draft accordingly.

WILLIAM L. PUTNAM, *Arbitrator.*

And, thereafterwards, during the proceedings hereinafter set out, Frances M. Brown, who had, previous to the award to which this is a supplement, been duly appointed by the Probate Court for the County of Suffolk and Commonwealth of Massachusetts, administratrix of the goods and estate of William White, in lieu of said Rufus H. Spalding, and who had been allowed to appear, and had appeared, in this cause as party plaintiff, administratrix, in lieu of said Rufus H. Spalding, administrator, deceased on the third day of December, nineteen hundred and two, and her husband, Albert W. Brown, was, thereafterward, on the twenty-sixth day of December, nineteen hundred and two, duly appointed and qualified by
195 the Probate Court of said County of Suffolk, administrator of the goods and estate of said William White, as successor to said Frances M. Brown as such administratrix; and further, thereafterwards, on the twenty-sixth day of December, nineteen hundred and two, the will of said Frances M. Brown was duly allowed and established by said Probate Court for the County of Suffolk, and said Albert W. Brown was duly appointed and qualified executor thereof; and further, thereafterwards, on the thirtieth day of December, nineteen hundred and two, said Albert W. Brown was allowed to appear, and did appear, in the cause aforesaid, as administrator of the goods and estate of said William White, as executor of said will of said Frances M. Brown, and individually as sole devisee and legatee under said will.

Subsequent to the proceedings preliminary and preparatory already referred to, on the eleventh day of March, nineteen hundred and two, at half-past two o'clock in the afternoon, at twenty-seven School Street in the City of Boston, and State of Massachusetts, I, said William L. Putnam, as such arbitrator, commenced the hearing of all the parties in interest with reference to the subject matter of this supplemental award, having given due and reasonable notice thereof, and of the time and place of commencing said hearing, to said Frances M. Brown, individually and as administratrix of the goods and estate of said William White, to Frank B. Cotton, administrator, as aforesaid, of the goods and estate of George N. Fletcher, to Mrs. Grace King, wife of Charles B. King, of Detroit, in the State of Michigan, and to Frank W. Fletcher and Allan M. Fletcher, each of Alpena, in the State of Michigan, said Grace King, Frank W. Fletcher and Allan M. Fletcher being all the children, and the devisees and legatees of said George N. Fletcher and said Frank W. Fletcher and Allan M. Fletcher being the executors of the
196 will of said George N. Fletcher, appointed and qualified as such by the court at the domicile of said George N. Fletcher having jurisdiction of the probate of said will, and the appointment and qualification of the executors thereof, at the place of said domicil.

At the time and place appointed as aforesaid, to wit, at twenty-seven School Street, in the City of Boston aforesaid, at half-past two o'clock in the afternoon of said eleventh day of March, nineteen hundred and two, I, said William L. Putnam, was there present as arbitrator aforesaid, prepared to hear the parties aforesaid, or any

other parties in interest, and proceeded to the determination of the matters to be determined by me as such arbitrator, and to complete my determination and award herein.

There were present at the time and place aforesaid said Frances M. Brown, individually and as administratrix aforesaid, and her counsel, and, also, said Frank B. Cotton, administrator as aforesaid, and his counsel.

Said hearing continued from time to time, by regular adjournments, at said twenty-seven School Street, to and including the twentieth day of January, nineteen hundred and three, during which period, at said various adjournments, I, said William L. Putnam, as such arbitrator, heard the parties, their proofs, and the arguments of their counsel, and, having heard all the same, I, as such arbitrator, pursuant to the agreements and entry hereinbefore set out, determine, adjudge and award as follows:

I determine, adjudge and award that my aforesaid award, dated on the twenty-seventh day of April, eighteen hundred and ninety-four, should be, and the same is, hereby reaffirmed, and that neither at the time of the decease of said George N. Fletcher, nor at any other time, was there, or is there now, any balance due him, said Fletcher, or his estate, from said Frances M. Brown individually, or as
197 administratrix, or from said Albert W. Brown individually, or as administrator, or executor, or from any other person, according to article second of my said previous award; and that, therefore, said George N. Fletcher was holden to convey, and should have conveyed, to said Frances as sole heir of said White, her heirs and assigns, to her and their use forever, one-fourth part in common of all the interests acquired by him, said Fletcher, as particularly set out in said article second, said conveyance to be made as therein set out; and that said Albert W. Brown, as devisee of said Frances M. Brown, or whosoever may be in privity of title with said Frances M. Brown, is now entitled to such conveyance, and the heirs, devisees, legatees, executors, and other representatives of said George N. Fletcher, are now holden to convey to him, said Albert W. Brown, or other persons in privity with said Frances, to hold to him or them, his or their heirs and assigns, for his or their use forever, all said one-fourth part in accordance with said article second.

And further, in pursuance of said agreements and entry hereinbefore set out, I, said William L. Putnam, as such arbitrator, determine, adjudge and award that the liability of said George N. Fletcher referred to therein, and to be determined by me as such arbitrator, at his decease, to wit, on the sixth day of November, eighteen hundred and ninety-nine, to said Frances M. Brown as administrator of the goods and estate of said William White, amounted to thirty-three thousand, one hundred twenty-one dollars and eleven cents; and further, in pursuance of said agreements and entry, I, said William L. Putnam, as such arbitrator, further determine, adjudge and award that the liability aforesaid to said Frances M. Brown amounted on said sixth day of November, eighteen hundred and ninety-nine, at the death of said George N. Fletcher, to three hundred fourteen thousand, ninety-five dollars and fifty-six cents.

And I, said William L. Putnam, as such arbitrator, having computed interest on the principal sums making part of
198 the amounts above awarded, from said sixth day of November, eighteen hundred and ninety-nine, to the fifth day of February, nineteen hundred and three, the date of this award, further, in accordance with said agreements and entry, determine, adjudge and award that the liability aforesaid from the estate of said George N. Fletcher, his administrator and executors, to said Albert W. Brown as administrator of the estate of said William White, on and as of said fifth day of February, nineteen hundred and three, is thirty-five thousand, six hundred and sixty-nine dollars and sixty-three cents.

And further, having computed interest as aforesaid, I, said William L. Putnam, as such arbitrator, determine, adjudge and award, in accordance with said agreements and entry, that the liability aforesaid from the estate of said George N. Fletcher, his administrator and executors, to said Albert W. Brown, as executor of the will of said Frances M. Brown, as and of said fifth day of February, nineteen hundred and three, is three hundred and forty-seven thousand, two hundred and twenty-five dollars and eleven cents.

And further, in pursuance of said agreements and entry, I, said William L. Putnam, as *such* arbitrator, determine, adjudge and award that said Albert W. Brown, as administrator of the goods and estate of said William White, is entitled to recover from the administrator and executors of said George N. Fletcher, or either of them, as the case may be, said sum of thirty-three thousand, one hundred and twenty-one dollars and eleven cents, the amount due as aforesaid from said George N. Fletcher on said sixth day of November, eighteen hundred and ninety-nine, to said Frances M. Brown, as administratrix of the goods and estate of said William White, with interest as aforesaid to said fifth day of February, nineteen
199 hundred and three, amounting in all to the sum of thirty-five thousand, six hundred sixty-nine dollars and sixty-three cents, and also, that said Albert W. Brown, as executor of the will of said Frances M. Brown, is entitled to recover from the estate of said George N. Fletcher, his administrator or executors, or either of them, as the case may be, said sum of three hundred fourteen thousand, ninety-five dollars and fifty-six cents, the amount due as aforesaid from said George N. Fletcher to said Frances M. Brown on said Sixth day of November, eighteen hundred and ninety-nine, with interest as aforesaid to said fifth day of February, nineteen hundred and three, amounting in all to the sum of three hundred forty-seven thousand, two hundred twenty-five dollars and eleven cents.

And I, said William L. Putnam, as such arbitrator, further, in pursuance of said agreements and entry, determine, adjudge and award that said administrator and executors of George N. Fletcher, and each or either of them, shall forthwith pay to said Albert W. Brown, as such administrator of the goods and estate of William White aforesaid, said sum of thirty-three thousand, one hundred twenty-one dollars and eleven cents, with interest as aforesaid from

said sixth day of November, eighteen hundred and ninety-nine, to said fifth day of February, nineteen hundred and three, amounting in all to the sum of thirty-five thousand, six hundred sixty-nine dollars and sixty-three cents, and to said Albert W. Brown, as executor of the will of said Frances M. Brown, said sum of three hundred fourteen thousand, ninety-five dollars and fifty-six cents, with interest as aforesaid from said sixth day of November, eighteen hundred and ninety-nine, to said fifth day of February, nineteen hundred and three, amounting in all to the sum of three hundred forty-seven thousand, two hundred twenty-five dollars and eleven cents.

200 With reference to this final report and award, neither party has requested the arbitrator that any questions of law be reserved, as provided in the agreement of arbitration, bearing date the fourth day of April, 1893, or as otherwise provided.

And, whereas, in the amounts awarded as aforesaid against said George N. Fletcher, his administrator and executors, are included certain sums which said George N. Fletcher received for the sales of certain lots, being parts of the pine lands described in article third of the award of said William L. Putnam, dated April twenty-seventh, eighteen hundred and ninety-four, so that, without reference to the question whether or not said George N. Fletcher could, without the formal consent of said William White or said Frances M. Brown, give a clear title to the same, the parties plaintiff herein may be equitably estopped from making any claim thereto;

Now, therefore, in order to indicate what lots and parcels are thus included in this award, I have prefixed to the amended account filed before me by said Frances M. Brown in her individual right and as administratrix, a statement as follows:

"COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING, Administrator,
vs.
GEORGE N. FLETCHER ET AL.

This book, marked as follows: 'Spalding, Adm'r, *v.* Fletcher. Ex. No. 66. June 19, 1902. Walter Rogers, Stenographer,'

201 is the amended account of the plaintiff, Frances M. Brown, in her indivdual right and as administratrix, produced before William L. Putnam, Arbitrator, in the foregoing cause, at the final hearing before him as such arbitrator. The pages in this book headed: 'Stumpage. Pine Land Descriptions,' refer to stumpage claimed to have been sold by George N. Fletcher from the pine lands owned by him in common with Mr. White, according to article third of the preliminary award of said Putnam, made under date of April 27, 1894. The entries on the left hand halves of the pages represent the claim as made by the parties plaintiff relative to the lands aforesaid, while the entries on the right-hand halves of said pages are

stated by the parties plaintiff to represent certain credits appearing in the accounts and books of George N. Fletcher.

The entries on the left-hand halves of said several pages were made use of by said Putnam, as such arbitrator, in fixing the several amounts allowed by him in his final award. Those entries cover not only stumpage, but certain lots or parcels sold out of said lands by said George N. Fletcher, so that, so far as the arbitrator has awarded the same to the parties plaintiff in the final award, the parties plaintiff may be estopped from claiming the lots or parcels themselves.

The various items so contained in said left-hand halves of said several pages against which nothing appears to show that the amounts represent stumpage, are proceeds of lots or parcels sold as aforesaid; so that, so far as all the same are concerned, the parties plaintiff may be estopped from making any claim to the lots or parcels themselves against the purchasers or those in privity with them.

(Signed) WILLIAM L. PUTNAM."

I, said William L. Putnam, as such arbitrator, have also,
202 directed that said amended account, being described as Exhibit No. 66 as aforesaid, should be deposited with the Supreme Judicial Court for the County of Suffolk, in the cause to which this award appertains, to be there preserved for the benefit of all parties concerned, and for the protection of their several interests.

I, said William L. Putnam, as such arbitrator, further determine, adjudge and award that said award, dated April twenty-seventh, eighteen hundred and ninety-four, and this award supplemental thereto, cover, determine and dispose of all matters and things submitted to me by virtue of the agreements and entry aforesaid, or by virtue of any other matter or thing whatsoever.

All the books and papers which have come into my possession, I have directed Mr. George P. Ayres, messenger of the Circuit Court of Appeals for the First Circuit, as representing me, to deliver into the office of the Clerk of the Supreme Judicial Court for the County of Suffolk and Commonwealth of Massachusetts.

My charges as arbitrator under this supplemental award, for my own services, are fifteen hundred dollars, and for my disbursements, including traveling expenses, stenographers, accountant and messengers having charge of books and papers, four hundred eighty-three dollars and nine cents.

The disbursements of the plaintiffs in this case, so far as they appertain to this arbitration, which, according to the laws of the State of Massachusetts, are taxable as costs in favor of the prevailing party are eleven thousand four hundred and seventy-eight dollars and thirteen cents ($11,478.13).

So far as it remains in the power of myself, said William L. Putnam, as arbitrator, to determine the same, I determine, adjudge and award that the plaintiffs recover from the estate of said George N. Fletcher, his administrator and executors, as the case may be,
203 as costs appertaining to this arbitration, either under this award or the award to which this is supplemental, said sum of eleven thousand four hundred seventy-eight 13/100 dollars

($11,478.13), and that the same be paid, to, received by, and apportioned as follows:

Said Albert W. Brown, as administrator of the estate of said William White, and said Albert W. Brown, as executor of the will of said Frances M. Brown, shall receive the same in his two several capacities pro rata to the amounts herein awarded to him in his said several capacities.

The costs which have been awarded by me, said Putnam, as arbitrator, are such as appertain only to this award, or the award to which this is supplemental.

The triplicate of this award filed with the Supreme Judicial Court for the County of Suffolk, State of Massachusetts, is the true original award, and if, in copying, any errors have slipped into the other triplicates, said other triplicates must be construed to conform to this the true original.

My attendance at Boston, Massachusetts, with reference to this supplemental award has been thirty-eight days according to the notes kept by the stenographer and counsel for the plaintiff, and my attendance at Portland, with reference to the same matter, according to my estimate has been twenty days.

Given at Boston, in the Commonwealth of Massachusetts, under my hand and seal in triplicate, this fifth day of February, nineteen hundred and three.

WILLIAM L. PUTNAM, [SEAL.]
Arbitrator.

(On the back:) 26. Eq. Commonwealth of Massachusetts, Supreme Judicial Court, Suffolk, *ss.* Rufus H. Spalding, adm'r, 204 *v.* George N. Fletcher *et al.* Supplemental Award of William L. Putnam, Arbitrator. Feb. 5, 1903. Mem. This is the triplicate to be filed with Supreme Judicial Court. Filed Feb. 5, 1903. (Sgd.) Att. C. H. Cooper, asst. clerk. Feb. 10, 1903, opened in Court on motion and by order of Court, no party objecting. (Sgd.) Att. John Noble, Clerk.

(Envelope containing foregoing award endorsed as follows, to wit:)

To the clerk of the Supreme Judicial Court for the County of Suffolk:

The within contains the final award of William L. Putnam, Arbitrator in Rufus H. Spalding, Administrator, against George N. Fletcher *et al.*, in equity made in triplicate, the within triplicate being sealed by me.

(Sgd.) W. L. PUTNAM,
Arbitrator.

Filed Feb. 5, 1903.

(Sgd.) Att.: C. H. Cooper, Asst. Clerk. Feb. 10, 1903, opened.

(*Final Decree Sup. Jud. Ct. in Eq.*)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING, Administrator,
vs.
GEORGE N. FLETCHER, JAMES CAMPBELL, & ELIZA WHITE.

This cause coming on to be heard upon the confirmation of an award heretofore made in said cause, and the settlement
205 of the decree therein, after hearing counsel for the plaintiff, and after inspection of the pleadings and proceedings in the cause, it appearing to the court that the bill of complaint in said cause was filed on the twenty-fourth day of April in the year one thousand eight hundred and seventy-four, and that all of the defendants therein named duly appeared and answered the same;

And it further appearing that such proceedings were thereafter taken in the cause, that, on the fourth day of April in the year one thousand eight hundred and ninety-two, articles of submission, under seal, were entered into between certain of the parties thereto, referring the matters in issue in said cause to arbitration, which articles or covenant of submission was filed in the cause and is in the words and figures following, to wit:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING, Adm'r,
v.
GEORGE N. FLETCHER ET AL.

Said Complainant, Rufus H. Spalding, and said defendant, George N. Fletcher, and Frances M. Brown, who has been made a party to said suit, agree to submit to the arbitration of Hon. William C. Endicott, of Salem, Massachusetts, all the claims and demands set forth in said suit, and all other claims and demands which either party may have against the other; and especially all claims and demands which said Spalding as administrator may have, or which the estate of his intestate may have, against said Fletcher, and all claims which the said Fletcher may have against said Spald-
206 ing as administrator, or against said estate, whether represented by said Spalding or by any successor in the administration of said estate, and all claims which the said Frances M. Brown may have against said Fletcher, or that said Fletcher may have against said Frances M. Brown.

And the said George N. Fletcher and the said Frances M. Brown, each respectively, covenant, promise and agree, to and with each

other, for themselves and their respective heirs, executors and administrators that they will abide by and faithfully perform and fulfill all the terms and conditions of any award which may be made by said arbitrator, or by any substitute or successor as hereinafter provided; and said George N. Fletcher, for himself and his heirs, executors and administrators, and said Rufus H. Spalding for himself and for the estate which he represents, covenants, promises and agrees, each to and with the other as follows:

The said Fletcher covenants, promises, and agrees that he will and his heirs, executors and administrators shall faithfully fulfill and perform all the terms and conditions of any award which may be made by said arbitrator, or his substitute or successor as aforesaid, for the doing of any act or the payment of any sum of money which said arbitrator may award that he shall do or pay to said Spalding, as administrator of the estate of said White, and that he will and his heirs, executors and administrators shall likewise perform and pay any such award to any successor of said Spalding in the administration of said estate, and said Spalding covenants, for himself and his successors, not personally but as an obligation of the estate, that said estate shall perform and fulfill any award and pay any sum which said arbitrator shall award to be paid by said estate to said Fletcher; and said Frances M. Brown covenants, promises and agrees to and with said Fletcher that if said Spalding shall decease, or
207 be removed from the administration of said estate, his successor shall well and truly abide by and perform all the terms and conditions of any award made by said arbitrator, or his substitute or successor as aforesaid, which are to be performed and fulfilled by said estate or by its administrator to said Fletcher; it being the intention of this submission to forever settle all controversies between all said parties, and that the decease of any party shall not revoke said submission but that said arbitration shall continue, and that the successors of said Spalding, and the legal representatives of said Brown and said Fletcher, shall be bound by the final award therein.

And it is further agreed by the said parties that if said arbitrator shall decease, or shall become incapacitated to act as arbitrator, then in that case the parties shall agree upon an arbitrator who shall take his place, with all the power and authority herein submitted to the arbitrator herein named, and if the parties shall fail to agree to make such appointment within thirty days from the decease or incapacity of said arbitrator, either party may apply to any Judge of the Supreme Court to appoint an arbitrator in the place of the arbitrator hereby appointed, who shall have all the powers and authority vested in the arbitrator herein named.

And it is further agree that all the evidence hereinbefore taken in said cause, either under the commissions appointed by the court, or before the Master appointed in said cause, and the reports of said Master, shall be submitted to said arbitrator, but the reports shall not have the same force and effect as the same would have had and received in a hearing before said Court, but they shall have only such force and effect, if any, as the arbitrator may see fit to give

them, it being agreed that a judgment of the arbitrator shall be final upon all the questions of law and fact, except as hereinafter
208 provided, and that any of said evidence which may be regarded by said arbitrator as inadmissible or incompetent, may be rejected by him.

And it is agreed that in the hearing of the questions submitted to the arbitrator he shall first pass upon the general question of liability or non-liability and announce his decision without taking any additional evidence; and in case he shall decide that a liability exists the parties shall have a reasonable time to produce evidence and determine the amount of said liability. And when the final award shall be made by said arbitrator, either party may apply to said court for a decree to enforce the same, or the same may be enforced by a decree or judgment in any other court having jurisdiction of the parties. And the prevailing party shall be entitled to have a decree or judgment entered in any court, having jurisdiction over the party against whom such award may be made, in conformity with the award so made, as a judgment entered by consent which is hereby given.

Upon the final report of the arbitrator any questions of law except those arising upon the admissibility and weight of the evidence shall be reserved for the decision of the Court, upon the request of either party, and in this connection the statutes and decisions of Michigan shall be admissible without other proof than the recognized books of statutes and reports and any question arising thereon shall be treated as a question of law and not of fact.

The submission is to be made under a rule of this Court and not to operate as a discontinuance of said suit.

In Witness Whereof the parties hereto have set their hands and seals, this Fourth day of April, 1892.

(Sgd.)	GEO. N. FLETCHER.	[SEAL.]
"	FRANCES M. BROWN.	[SEAL.]
"	RUFUS H. SPALDING, *Administrator.*"	[SEAL.]

209 And it further appearing that, in accordance with said submission, a rule of this Court was afterwards, to wit, on the eighteenth day of October in the year one thousand eight hundred and ninety-three, entered in the cause whereby the cause was referred to the determination of Hon. William L. Putnam pursuant to said articles of submission, and that such proceedings were had thereon, that afterwards, in accordance with the submission of the parties providing therefor, the said William L. Putnam on the twenty-second day of May in the year eighteen hundred and ninety-four filed in this cause his preliminary award, which preliminary award was in the words and figures following, to wit:

"COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING, Administrator, now FRANCIS M. BROWN, Administratrix,

v.

GEORGE N. FLETCHER ET AL.

Pursuant to the agreement signed by George N. Fletcher, Frances M. Brown and Rufus H. Spalding, Administrator, dated the fourth day of April, Eighteen hundred and ninety-two, the entry made in the foregoing cause under date of October Eighteen, Eighteen hundred and ninety-three, and the agreement signed "Geo. Wm. Estabrook, for Mrs. Frances M. Brown, administratrix & individually," and "J. Lowell for defendant Fletcher," dated Boston, March Second, Eighteen hundred and ninety-four, copies of which are attached hereto, and are marked respectively and signed by me as follows:

210 "The foregoing is Exhibit A, attached to my award made April, Eighteen hundred and ninety-four, William L. Putnam,"

"The foregoing is Exhibit B, attached to my award made April, Eighteen hundred and ninety-four, William L. Putnam."

"The foregoing is Exhibit C, attached to my award made April, Eighteen hundred and ninety-four, William L. Putnam." I have heard the parties to said agreements, to wit, Frances M. Brown, individually, Frances M. Brown, Administratrix, and George N. Fletcher, their proofs and counsel, and decide, determine and award as follows:

Article First. Said Frances M. Brown is the daughter and sole heir of William White of Boston, who deceased April Twenty-Eight, Eighteen hundred and Seventy-three. At the time of his decease said George N. Fletcher held the legal title in fee simple of the following real estate in Michigan, and subject to the partition hereinafter named, namely:

That one half in common conveyed to him by the warranty deed of Erastus Bailey and wife to James K. Lockwood and him, said Fletcher, dated November twenty-one, Eighteen hundred and fifty-five, and recorded in Alpena County Records of Deeds, August twenty-three, Eighteen hundred and Seventy-two, Liber I, page four hundred and fifty-four, and that one half in common conveyed to him by deed, dated April Eleven, Eighteen hundred and fifty-nine, from James K. Lockwood, of one part, to him, said Fletcher, of the other part, and recorded in the same records, May thirty, Eighteen hundred and fifty-nine, Liber A, page Sixty-four.

Said Fletcher had, prior to the death of said White, to wit, on the first day of September, Eighteen hundred and fifty-eight,
211 agreed with said White to convey to him, said White, his heirs and assigns, forever, one undivided fourth part of all the

interests acquired by him, said Fletcher, by said two deeds from Erastus Bailey and wife and from James K. Lockwood, for a Consideration which was fully paid by said White to said Fletcher before August fifteen, Eighteen hundred and Seventy-one.

Subsequent to said agreement of September one, Eighteen hundred and fifty-eight, and in October, Eighteen hundred and sixty-five, there had been a partition, by deed, between said Fletcher and the parties owning the other half in common of the lands of which one-half in common was conveyed to said Fletcher by said deeds from said Bailey and wife and said Lockwood, by means of which partition said Fletcher's one-half interest therein was set out to him in severalty; but the details of the parcels so set out to him need not be described herein. Said parcels, however, so set out to him in severalty, stand for all present purposes, and for all the matters hereinafter appearing in this decision, determination and award, in lieu of and subject to the same rights and duties as the said one-half interests in common conveyed to him, said Fletcher, by the deeds aforesaid; and wherever hereinafter, the interests so conveyed to said Fletcher are referred to, the same are to be construed as meaning and intending to cover the parcel thus set out in severalty to said Fletcher. Though at the time of the death of said White, said Fletcher so held the legal title to all the interests conveyed to him by said two deeds from said Erastus Bailey and wife and from said Lockwood, yet he, said Fletcher, then held one-fourth part in common of all such interests in trust for said White, his heirs and assigns, by virtue of the agreement aforesaid, dated September one, Eighteen hundred and fifty-eight, and by virtue of the payments made by said White to said Fletcher as aforesaid, and had not
212 conveyed to said White any part thereof, nor, since the death of said White, has he conveyed to said Frances M. Brown any part thereof. At the death of said White, said Fletcher was liable and holden in law, and is still liable and holden in law, to convey the same one-fourth part in common to said White, his heirs or assigns, to his and their use forever, on demand of said White, his heirs or assigns; but said White had not demanded such conveyance and had left the entire property subject to the management and control of said Fletcher for the common interests.

Article Second. Said Fletcher is now holden to convey, and he shall convey, to said Frances, as such sole heir of said White, her heirs and assigns, to her and their use forever, one-fourth part in common of all the interests acquired by him, said Fletcher, by said two deeds from said Erastus Bailey and wife, and from said Lockwood, including one-fourth part of all the parcels so set off to him in severalty, except so far as the same have, prior to this award, been sold or otherwise disposed of by him, said Fletcher, said conveyance to be made forthwith, if no balance is due to him, said Fletcher, from said Frances M. Brown, individually or as administratrix, as hereinafter set out; or, if any such balance is due, then forthwith upon the payment thereof.

The character of the deed to be given by said Fletcher to said

Frances M. Brown shall be such as to embrace all the same right, title and interest acquired by him in and to said one-fourth part in common, subject to the exceptions aforesaid of parcels sold or disposed of by him prior to this award, with a proper Warranty that the same are free of any incumbrances created by, through or under him, except unpaid taxes, which are to be assumed and paid by said Frances M. Brown.

Article Third. Prior to and at the time of the death of said White, said Fletcher had, to a certain extent, the management of certain other lands in the State of Michigan which had been conveyed by deed or deeds to George N. Fletcher, James Campbell and William White. The share of said White in the said lands named in this article was one-fourth part in common, and the record and equitable title in fee was vested in him in his life time, and was vested, and ought to be vested, in said Frances as his sole heir, after his decease.

Article Fourth. Prior to the decease of said White, and on the fifteenth day of August, Eighteen hundred and Seventy-one, all matters to that date between said Fletcher and said White, relating to any of the foregoing lands named in articles one, two and three, or either of them, or to the management or sale or other disposition of them, or to improvements upon them or in connection with them, or to stumpage taken from them, or otherwise in reference thereto, were settled, and the balance ascertained.

Article Fifth. Said Fletcher is holden to said Frances, as administratrix, to render account to, and shall render account to her, as administratrix, and to compensate, and shall compensate her, as administratrix, for the balance due from said Fletcher to said White, as shown by said settlement of August fifteen, Eighteen hundred and Seventy-one, and for her proportion of all moneys and property received by him, said Fletcher, since the said fifteenth day of August, by reason of any matters described in Article Four occurring on or before said fifteenth day of August, and is holden to her, as administratrix, to render account to, and shall account to her, as administratrix, and to compensate, and shall compensate her, as administratrix, to the extent of her proportion, for all matters of the character described in Article Four, occurring between said fifteenth day of August and the death of said White, and is holden to said Frances, individually, as sole heir of said White, to account to, and shall account to her, and is holden to compensate her, and shall compensate her to the extent of her proportion, for all matters of the character described in Article Four, occurring since the death of said White. The proportion so to be accounted and compensated for is one-fourth and no more; and the account and compensation shall be on the principles applying between trustee and *Cestui que trust;* with all allowances which may be found due according to such principles; but with reference to all the premises said Fletcher is entitled, and shall be entitled, to allowances from said Frances as such administratrix, and from said Frances individually, as the case may be, of and for all his payments, if any, to said White, or to said Spalding, as such administrator, or to said Frances, as

such administratrix, or to said Frances individually, on account of the premises since said fifteenth day of August, and to one-fourth part of all his such reasonable and just disbursements and allowances in reference thereto, since said fifteenth day of August, as he may be found entitled to on the said principles of accounting between trustee and *cestui que trust*.

Article Sixth. Said Fletcher is not holden or liable to said Frances, either as administratrix or individually, for any stock in the Alpena Harbor Improvement Company, or for the sum of forty-two hundred and fifty dollars, or any part thereof, being the amount said to have been received by said Fletcher from said White for investment in such stock.

Article Seventh. There is no liability either way with reference to any matter submitted to my arbitration, except as stated in the foregoing articles one to six, each inclusive.

Article Eighth. Said Frances as administratrix shall recover from said Fletcher the taxable costs of this suit and of this arbitration, including the fees and disbursements of the arbitrator.

215 The foregoing articles one to eight, each inclusive, constitute my decision, determination and award, and are not modified by anything hereinafter set out.

But whereas the agreement hereto attached, Marked "Exhibit A," provided that, on the final report of the arbitrator, certain questions of law should be reserved for the decision of the Court, on the request of either party:

And whereas, pending the hearing, the complainant filed with me a paper entitled "Plaintiffs' suggestions of findings," and also a paper setting out plaintiffs' further specifications of claims, copies of which are appended hereto, respectively marked by me as follows, "Exhibit D," and "Exhibit F," "attached to my award of April, Eighteen hundred and ninety-four, William L. Putnam," and said Fletcher filed with me, as aforesaid, a paper entitled "Defendant Fletcher requests the Court to find under the evidence as follows," a copy of which is appended hereto and marked "Exhibit E, attached to my award of April, Eighteen hundred and ninety-four, William L. Putnam."

Now therefore, I make the following statements concerning the only questions of law which I conceive to be involved in the foregoing determination, decision and award, being ready, however, to make such further statements touching any other questions of law thus involved, if either party in interest shall show to me that any have been omitted.

With reference to the Statute of frauds, parties put in evidence before me; by the agreement marked "Exhibit A," all the Statutes of Michigan and all the decisions of the Courts thereof touching the same. I found, as a matter of fact, that the obligations and liabilities of said Fletcher and the trust imposed on him, all as set out in the foregoing award, except those relating to the lands described in

Article three, originate with the contract dated September
216 one, Eighteen hundred and fifty-eight, already referred to, of which a copy is appended hereto, marked: "The foregoing is Exhibit F. F., attached to my award of April, Eighteen hundred and ninety-four, William L. Putnam," which contract was executed

and delivered, and bound the parties, and was in force at the death of said White and ever since; and all arose out of said contract and the other matters herein stated.

I do not find that payment of the balance of Eighteen thousand dollars in cash was made as provided in said Contract: but I did find that said White made full payment to said Fletcher during the life time of said White for the one-fourth interest of the one-half in common of the lands conveyed by Bailey and wife and by Lockwood, as hereinbefore set out, to said Fletcher; that the said one-half in common so conveyed to said Fletcher, was the same as that described in said agreement of September first, Eighteen hundred and fifty-eight, as one undivided half of the Bailey and Lockwood and Minor purchases, so called, of lands at the Mouth of Thunder Bay River in said State; that there were no lands at the mouth of Thunder Bay River to which such description in said agreement could apply, except those of which one undivided half was conveyed by the deeds aforesaid to said Fletcher; that the evidence of the identity of the one undivided half described in said contract with the half in common conveyed by said deeds, was, as a matter of fact, conclusive, and, as a matter of fact, there was no misunderstanding and could be no misunderstanding between the parties to the contract, or by any other person who might investigate with reasonable care, touching the same, although at the date of said contract said deeds had not been recorded; that although the Eighteen thousand dollars was not paid in cash as provided in said agreement, strict compliance with this provision was waived by said
217 Fletcher, and payment for said White's one-fourth interest was made, as already said, in a manner accepted by said Fletcher in lieu of the form of payment provided by said contract, and in all respects as the equivalent thereof, so far as concerned said White's one-fourth interest, although the precise manner of said payment I did not determine.

Said contract was made in the State of Massachusetts, James Campbell, named therein, and said White then residing in Massachusetts, and said Fletcher then residing in Michigan; but whether or not the Statute of frauds of Massachusetts or the Statute of frauds of Michigan is applicable to the case, I did not find it necessary to determine, because I rule that the transaction was sufficient under all the circumstances to bind said Fletcher, as hereinbefore set out, under the Statute of frauds of Massachusetts or under the Statute of frauds of Michigan. As bearing on this proposition, I found that not only did said White make full payment for his said one-fourth interest as aforesaid, but that said White paid said Fletcher, and said Fletcher accepted from said White, partly by advances by said White and partly by allowances in account, sundry amounts on account of said White's one-fourth of the expenditures made by said Fletcher, upon and in reference to the interests deeded by said Bailey and wife and said Lockwood to said Fletcher, including among the other things said White's one-fourth of the cost of constructing a mill on the lands, of lithographing maps of the lands showing the lots into which they were divided for sale, of taxes thereon for

several years, and of various incidental expenses running through the period commencing with the date of said Contract, and ending with the death of said White. I further found, that, during the lifetime of said White, said Fletcher, in numerous dealings with said White, practically recognized the interest of said White
218 as aforesaid. I also found that in a letter from said Fletcher to W. A. Righter, dated the fourteenth day of February, Eighteen hundred sixty, he wrote said Righter as follows: "Two years since I sold Mr. White one-quarter for $9,000," but I did not find sufficient in this letter to identify the lands under the requirements of the Statute of frauds, and therefore I gave no effect to this letter on that particular point; and the same observation applies to other letters and the lithographic plan, put into the case. I found no facts touching the question of the Statute of frauds except as herein stated. I did not determine whether or not the relation between Fletcher and White was that of Copartners. I did not find it necessary so to do, because the present obligations and liabilities of said Fletcher to said Frances, individually and as administratrix, are precisely the same, and an accounting and settlement between the parties to this award can be completely made, and would be made in precisely the same manner and with the same results, whether or not there was a Co-partnership, or whether or not the relationship was merely that of a joint or common interest in pine lands and other lands, to be developed, managed and disposed of by said Fletcher for the benefit of all concerned. Moreover, it may be that the interests of the widow of said William White are involved in the question whether these lands were held by said White and Fletcher merely as joint tenants or co-tenants, or strictly as copartners, and the said widow was not a party to the proceedings before me; so the proper parties were not before me to enable me to dispose of that question.

It was claimed by said Frances M. Brown, individually and as administratrix, that the interest of said William White was one-half instead of the one-fourth found by me in my foregoing award, in other words, that said White acquired the interest intended for James Campbell under said Contract of September first, Eigh-
219 teen hundred and fifty-eight. It appears by the proofs before me that said James Campbell was adjudged insolvent on the thirteenth day of May, Eighteen hundred and seventy-nine, and that such interests as he had, if any he had, were subject to an accounting and an equitable lien as between him and the estate or heirs of his father. Therefore, as neither said James Campbell, nor his assignee in insolvency, if there is such assignee, nor the representatives of his father's estate, nor the heir of his father, were parties to the proceeding before me, I was not in position to adjudicate touching the interests, if any there were, vesting in said James Campbell, or to determine whether they are still outstanding, or were forfeited and surrendered to said Fletcher, I was unable to find from any proof before me that they were transferred to said White. Touching the subject matter of the third and fourth paragraphs in the said requests of defendant Fletcher, attached hereto, I made

no finding nor determination, as I was able to determine, decide and award all the foregoing facts without the aid of any matters claimed to have been mutilated.

Touching all other matters contained in the said suggestions of the Complainant and the said requests of the defendant Fletcher, I perceive nothing as to which I found it necessary to pass upon any question of law; as the matters herein already stated, so far as I am able to perceive, cover all questions of law which it became necessary for me to pass upon in order to reach my determination, decision and award touching any fact hereinbefore set out.

All the books and papers which have come into my possession, I have deposited in the vault in the office of the Clerk of the United States Circuit Court for the District of Massachusetts, where I will hold the same subject to the joint order of the parties to this award, or to the order of the Court.

Before publishing the above award I submitted a draft
220 of it to George W. Estabrook, Attorney for the Complainant, and another draft to Hon. John Lowell, Attorney for defendant Fletcher, and received certain suggestions, per the letter of George W. Estabrook to me, dated May fifth, Eighteen hundred and Ninety-four, a copy of which is hereto attached, marked "Exhibit G, attached to my award of April, Eighteen hundred and ninety-four, William L. Putnam," and letter of Hon. John Lowell, addressed to me under date of May twelfth, Eighteen hundred and ninety-four, a copy of which is attached hereto marked "Exhibit H, attached to my award of April, Eighteen hundred and ninety-four, William L. Putnam."

I have made no award touching interest due to or from Fletcher, or touching any allowance for his alleged claim for services, as I understand that my authority at the present time is limited to stating the general rules of accounting so far as they are necessarily involved in the "general question of liability or non-liability."

Boston, April 27, 1894.

(Sgd.) WILLIAM L. PUTNAM.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING, Adm'r,
v.
GEORGE N. FLETCHER ET AL.

Said Complainant, Rufus H. Spalding, and said defendant, George N. Fletcher, and Frances M. Brown, who has been made a party to said suit, agrees to submit to the arbitration of Hon. William
C. Endicott, of Salem, Massachusetts, all the claims and de-
221 mands set forth in said suit, and all other claims and demands which either party may have against the other; and especially all claims and demands which said Spalding as Administrator may have, or which the estate of his intestate may have, against

said Fletcher, and all claims which the said Fletcher may have against said Spalding as administrator, or against said estate, whether represented by said Spalding or by any successor in the administration of said estate, and all claims which the said Frances M. Brown may have against said Fletcher, or that said Fletcher may have against said Frances M. Brown.

And the said George N. Fletcher and the said Frances M. Brown, each respectively, covenant, promise and agree, to, and with each other, for themselves, and their respective heirs, executors, and Administrators, that they will abide by and faithfully perform and fulfill all the terms and conditions of any award which may be made by said arbitrator, or by any substitute or successor as hereinafter provided; and said George N. Fletcher, for himself and his heirs, Executors and Administrators, and said Rufus H. Spalding for himself and for the estate which he represents, covenants, promises and agrees each to and with the other as follows:

The said Fletcher covenants, promises, and agrees that he will and his heirs, Executors and Administrators shall faithfully fulfill and perform all the terms and conditions of any award which may be made by said Arbitrator, or his substitute or successor as aforesaid, for the doing of any act or the payment of any sum of money which said arbitrator may award that he shall do or pay to said Spalding, as Administrator of the estate of said White, and that he will and his heirs, Executors and Administrators shall likewise perform and pay any such award to any successor of said Spalding in the administration of said estate, and said Spalding cove-
222 nants, for himself and his successors, not personally but as an obligation of the estate, that said estate shall perform and fulfill any award and pay any sum which said arbitrator shall award to be paid by said Estate to said Fletcher; and said Frances M. Brown covenants, promises and agrees to and with said Fletcher that if said Spalding shall deceases, or be removed from the administration of said Estate, his successor shall well and truly abide by and perform all the terms and conditions of any award made by said arbitrator, or his substitute or successor as aforesaid, which are to be performed and fulfilled by said estate or by its Administrator to said Fletcher; it being the intention of this submission to forever settle all controversies between all said parties, and that the decease of any party shall not revoke said submission, but that said arbitration shall continue, and that the successors of said Spalding, and the legal representatives of said Brown and said Fletcher, shall be bound by the final award therein.

And it is further agreed by the said parties that if said arbitrator shall decease, or shall become incapacitated to act as arbitrator, then in that case the parties shall agree upon an arbitrator who shall take his place, with all the power and authority herein submitted to the arbitrator herein named, and if the parties shall fail to agree to make such appointment within thirty days from the decease or incapacity of said arbitrator, either party may apply to any Judge of the Supreme Court to appoint an arbitrator in the place of the arbitrator

hereby appointed, who shall have all the powers and authority vested in the arbitrator herein named.

And it is further agreed that all the evidence hereinbefore taken in said cause, either under the Commissions appointed by the Court, or before the Master appointed in said cause, and the reports of said Master, shall be submitted to said arbitrator, but the reports
223 shall not have the same force and effect as the same would have had and received in a hearing before said Court, but they shall have only such force and effect, if any, as the arbitrator may see fit to give them, it being agreed that a judgment of the Arbitrator shall be final upon all the questions of law and fact, except as hereinafter provided, and that any of said evidence which may be regarded by said Arbitrator as inadmissible or incompetent, may be rejected by him.

And it is agreed that in the hearing of the questions submitted to the arbitrator he shall first pass upon the general question of liability or non-liability and announce his decision without taking any additional evidence; and in case he shall decide that a liability exists the parties shall have a reasonable time to produce evidence and determine the amount of said liability.

And when the final award shall be made by said arbitrator, either party may apply to said court for a decree to enforce the same or the same may be enforced by a decree or judgment in any other court having jurisdiction of the parties.

And the prevailing party shall be entitled to have a decree or judgment entered in any court, having jurisdiction over the party against whom such award may be made, in conformity with the award so made, as a judgment entered by consent which is hereby given.

Upon the final report of the arbitrator any questions of law except those arising upon the admissibility and weight of the evidence shall be reserved for the decision of the court, upon the request of either party, and in this connection the statute and decisions of Michigan shall be admissible without other proof than the recognized books of statutes and reports, and any question arising thereon shall be treated as a question of law and not of fact. The submission is to be made under a rule of this court and not to operate as a discontinuance of said suit.

224 In witness whereof, the parties hereto have set their hands and seals, this fourth day of April, 1892.

(Signed) GEO. N. FLETCHER. [SEAL.]
FRANCIS M. BROWN. [SEAL.]
RUFUS H. SPALDING, [SEAL.]
Administrator.

The foregoing is Exhibit A, attached to my award made April, eighteen hundred and ninety-four.

(Sgd.) WILLIAM L. PUTNAM.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

RUFUS H. SPALDING, Adm'r,
v.
GEORGE N. FLETCHER ET ALS.

And now the parties appear and agree to refer this action to the determination of William L. Putnam, in accordance with the stipulation of the parties on file, a copy of which is hereto annexed, (the previous reference to William C. Endicott having been revoked, upon motion of the parties) Pleadings may be amended, or supplemented by any party; report to be made as soon as may be; judgment thereon to be final and execution to issue accordingly; and if either party neglects to appear on due notice; then the reference to proceed *ex parte*.

JOHN NOBLE, *Clerk.*

October 18, 1893.
A true copy.
Attest:
(Sd.) C. H. COOPER,
Ass't Clerk.

The foregoing is Exhibit B, attached to my award made April, eighteen hundred and ninety-four.
(Sgd.) WILLIAM L. PUTNAM.

225 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

RUFUS H. SPALDING, Adm'r,
v.
GEORGE N. FLETCHER ET ALS.

Supplemental Agreement.

The parties agree that in passing upon the general question of liability or non-liability, the arbitrator shall find the proportions for which Mr. Fletcher shall account, if liable, and announce the same in the first instance, and that the accounting shall proceed on this basis, but neither party hereby waives the right to apply for a modification of the finding if a proper case for such application shall arise.

(Sgd.) GEO. WM. ESTABROOK,
For Mrs. Frances M. Brown, Administratrix & Individually.
(Sd.) J. LOWELL, *For D'ft Fletcher.*

Boston, 2 March, 1894.

The foregoing is Exhibit C attached to my award made April, nineteen hundred and ninety-four.

(Signed) WILLIAM L. PUTNAM.

Plaintiffs' Suggestions of Findings.

First. That Fletcher is liable and must account to the plaintiffs for one quarter of the partnership pine Lands and the proceeds and profits therefrom.

226 Second. That Fletcher is liable and must account to the Plaintiffs for one-half of the lands at the Mouth of the Thunder Bay River or the Bailey and Minor and Lockwood purchases, so called and the proceeds and profits therefrom.

Third. The Copartnership of Fletcher, Campbell and White was formed by Articles of Partnership (Exh. 1 Reed) and continued till White's death. James Campbell has since died and Fletcher is the sole surviving partner. The affairs of the partnership have never been settled and it is Fletcher's duty to account.

Fourth. The assets of the partnership include, Pine Lands, Mouth of River Lands, Cash, proceeds of sales, and exchanges to be ascertained on the accounting.

Fifth. The assets of the partnership embrace the Mouth of the River Lands. The full contribution of the assets of the partnership set out in the Articles was made. White contributing ¼ of the Pine Lands, and James Campbell also contributing ¼ of the Pine Lands, and White also contributing a legal or equitable interest in the Mouth of the River Lands valued at $9000 and cash $9000. Fletcher contributed the same being as much and no more than he agreed, and White contributed all required to meet both his and Campbell's obligation by the Articles, except the ¼ of the Pine Lands which Campbell contributed personally.

Sixth. The partnership was in possession of the Mouth of the River Lands during White's life and spent large sums in improvements on them, and expenses connected with them, and had fully paid the consideration therefor, and those lands were treated by the partnership as assets till death of White.

Seventh. White had from Fletcher some instrument vesting in him a legal or equitable interest to the extent of ½ of Fletcher's interest in Mouth of the River Lands.

227 Eighth. White had from Campbell some instrument vesting in him whatever legal or equitable interest Campbell had at the inception of the partnership in the Mouth of the River Lands.

Ninth. The Articles of Copartnership are a sufficient agreement or Memorandum to take the case out of the Statute of Frauds.

Tenth. The description of the land in the Partnership Articles is sufficient.

Eleventh. The writings put into the case were sufficient under the Statute of Frauds to vest the partnership with the lands known as the Bailey and Lockwood and Minor purchases towit: the lands described in deed of Erastus Bailey to Geo. N. Fletcher and J. K. Lockwood, dated Nov. 21, 1855, Exh. 22 Hurd, and in agreement,

bond and deed dated respectively Jan. 12 & 15, 1857, and April 11, 1859, and Exh. G. H. and J. Miner.

Twelfth. The Articles of Partnership constitute a sufficient memorandum under the Statutes of Frauds to warrant a decree for a conveyance of such lands, if they did not constitute a conveyance, and for account of proceeds of such lands.

Thirteenth. On all the facts in the case the partnership was vested with a sufficient title to require an accounting by Fletcher to the plaintiffs for the Mouth of River Lands.

Fourteenth. Fletcher conspired with Campbell and Mrs. White to defraud the estate, and is liable for the damages occasioned thereby.

Fifteenth. Fletcher conspired with Campbell and Mrs. White to defraud Mrs. Brown of her interest in real estate of William White, and is liable for the damages occasioned thereby.

Sixteenth. In pursuance of the conspiracy between himself, James Campbell and Mrs. White, Mr. Fletcher produced in evidence
228 the paper Ex. 2 Reed, as the original paper described in the Probate Account of James Campbell. The paper and all the endorsements upon it are in the handwriting of Fletcher and are all false and fictitious and were intended by him to defraud the plaintiffs.

Seventeenth. In pursuance of the conspiracy Fletcher made numerous alterations, mutilations and erasures on and suppressed his books of account and also suppressed and fabricated papers to conceal the facts relative to the payment of the $9000 indebtedness and to conceal the facts as to White's interests and properties and put the same in evidence with the intention of defrauding the plaintiffs.

Eighteenth. In pursuance of the conspiracy Fletcher misrepresented to and concealed from the plaintiffs' information in his possession and knowledge as to White's interest and properties.

Nineteenth. Fletcher converted to his use stock of White's in the Alpena Harbor Improvement Co., of the value of 5250 at the time of the conversion, which was some time in 1873.

Twentieth. Fletcher was indebted to White for $4200 received by him for his, White's use, on or before March 1869 for invalid stock in Alpena Harbor Improvement Co.

Twenty-first. That this being a bill in equity the entire equities between all the parties to the bill may be adjusted as they should be found to exist, and the rule of reference is still broader than the bill, and permits a full adjustment between White's Estate and its representatives and Fletcher, therefore, the full equitable interests of White's estate in the entire one-half of the assets at the Mouth of the River, and all profits arising therefrom may properly be allowed to White's estate in his finding without any intermingling with Campbell.

Twenty-Second. That James Campbell, was a party defendant in this suit, and in his answer denies that he claims any interest
229 in any joint transactions betwen said White and said Fletcher and in his testimony denied that he had any interest in any of the land at the Mouth of the River ever put any money into them

in any way, and after his death his estate having been given an opportunity to intervene in this suit, and having declined on the ground that its affairs were settled, said James Campbell was, and his estate is estopped from setting up any claim to any interest in the lands at the Mouth of the River, or from setting up any claim which shall prevent the full settlement of the controversy between the estate of White and Fletcher.

Exhibit D attached to my award of April, 1894.

(Signed) WILLIAM L. PUTNAM.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk:*

Supreme Judicial Court.

RUFUS H. SPALDING, Administrator of William White, Deceased, Complainant,

vs.

GEORGE N. FLETCHER, JAMES CAMPBELL, and ELIZA WHITE, Defendants.

In Equity.

Before Hon. Wm. L. Putnam, Special Referee.

Defendant Fletcher requests the court to find under the evidence as follows:

230 1. That the title of all the lands known in this case as pine lands, acquired by Thomas Campbell, deceased, and George N. Fletcher under the contract in writing between them, dated March 13, 1856, and all substitutions for any part of them under and by reason of the cancellation by Government of original entries, became vested in fee simple in George N. Fletcher (in the proportion of an undivided half) William White, the decedent, (in the proportion of an undivided quarter), and James Campbell (in the proportion of an undivided quarter), by the deed of John Campbell, sole legal heir of Thomas Campbell, bearing date and duly executed on December 10, 1859.

2. That defendant Fletcher never made an agreement, which was valid under the Statute of Frauds of Michigan, conveying of agreeing to convey to complainants' decedent William White any lands or any interest in lands in the State of Michigan.

3. That no presumption is raised against Fletcher for mutilations of his books of account and paper writings produced by him, or for changes in entries, where such changes are not shown to have been made in his handwriting, or such changes and mutilations are not shown to have been made, or directed by him or made when such books and papers were in his custody and control.

4. That this presumption of his custody and control, and of the continuance of his custody and control, from the fact that he produced the books and papers before the Master in this hearing is re-

Brown, in her capacity, as heir of William White, and also
234 as Administratrix *de bonis non* of the estate of William White, are included in said submission, and she has claims against George N. Fletcher which are not included in the bill in said suit, she therefore now specifies the nature and character of the claims in addition, which she insists upon being included in this hearing, as follows:

First. She claims all the interest, which at the time of his decease was held or claimed by William White, deceased, in all land in Michigan, whether standing in the name of George N. Fletcher, or James Campbell and William White, or in the name of the Thunder Bay Lumber Company, and all the receipts from the sale of any such lands since the decease of said William White; and all receipts arising from such sale or from the sale of lumber or stumpage from the said lands or in any other way.

Second. And the said Frances M. Brown as Administratrix *de bonis non* further represents that the said George N. Fletcher for consideration of $4,250—to him paid by said White, sold the said White one hundred and five (105) shares of the Capital Stock of the Alpena Harbor & Improvement Company, alleged to be a Corporation duly and legally organized under the laws of the State of Michigan, but the said Alpena Harbor & Improvement Company was not legally constituted as aforesaid, and no stock actually existed therein, in law, and the said Fletcher should account to and repay her, the said sum with interest from Mch. 1869 being the date of the alleged sale with interest; and further represents that prior to the decease of William White, the said Fletcher agreed with him to retake the said stock of him, and pay him therefor the sum of $5,250. said stock being at that time supposed to be valid issue, but said White dying before the agreement was fully consummated by the delivery of the stock and payment therefor, said Fletcher
235 subsequently to the decease of said White and the appointment of the Administrator upon his estate, took from Eliza White, widow of the said William White, the Certificate found among the papers of the said William, representing the said stock or shares, being in such form that an apparent title could be passed by delivery, and wrongfully paid her therefor the said sum of $5,250. with a view to convert the same to his own use, the said sum of $5,250. being then the market value or less than the market value of said stock, and avers that said Fletcher owes and should account to her as Administratrix, for the sum of $5,250. with interest from the date in 1873 of such conversion.

Third. That by reason of the conspiracy and acts done in pursuance thereof, between the said George N. Fletcher, James Campbell and Eliza White, the estate of said William White, and Frances M. Brown as heir of said estate, have been and are being put to a large amount of expense, time and trouble in endeavoring to obtain from the said Fletcher the property, interest and rights belonging to them, in the hands and possession and under the control of said George N. Fletcher; and she claims all damages that have arisen, or shall arise to her or said estate in consequence of such conspiracy.

Fourth. Frances M. Brown also claims and requests that said George N. Fletcher may be ordered to convey to her all the lambs or interest in the lands at the Mouth of the River so called, and in all the Pine Lands in Michigan, which William White owned at the time of his death and which stood then or since, in the name of said Fletcher or in the name of the Thunder Bay Lumber Company.

(S'g'd) By Her Att'y, DUDLEY A. DORR.

Exhibit F. attached to my award of April, Eighteen hundred and Ninety-four.

(Signed) WILLIAM L. PUTNAM.

236 Articles of Agreement this day made and entered into by and between George N. Fletcher of St. Clair, Michigan, on the one part, and James Campbell of Burlington and William White of Boston, both in the Commonwealth of Massachusetts, of the other part.

Witnesseth: That the said parties mutually agree to form, and do, by these presents, form themselves into a Company for the purpose of manufacturing lumber at the Mouth of Thunder Bay river, in the town of Fremont, and State of Michigan, to be called the "Thunder Bay Lumber Company," with a capital stock of Sixty-six thousand (66,000) dollars, fully paid in, in manner and form as hereafter fully described. One-half, or thirty-three thousand (33,000) dollars, by George N. Fletcher, and thirty-three thousand (33,000) dollars in equal parts, by James Campbell and William White, as follows, viz:

By the said Fletcher, Fifteen Thousand dollars, being his portion of fifteen thousand eight hundred and four een acres of Pine Lands, now standing in the name of Thomas Ca pbell, in the State of Michigan, and Eighteen Thousand (18,000 dollars being one undivided half of the Bailey and Lockwood and Minor purchases, so called, of lands at the Mouth of Thunder Bay River, in said State; and thirty-three thousand (33,000) dollars by James Campbell and William White, $15,000 in the lands, being the balance of the interest of the late Thomas Campbell in all the lands now standing in his name, situated as aforesaid, and the balance $18,000 in cash.

It is understood and agreed that all profits and losses of the said Company shall be mutually and equally divided between the said Fletcher on the one part, and James Campbell and William White on the other part; and it is further agreed, for the purpose of building a mill and carrying on the business of manufacturing lumber, that the said parties shall furnish such amount of capital as

237 may be deemed advisable, one-half by said Fletcher, and one half by the said Campbell and White; and if either party shall at any time furnish more than his proportional amount, then the said Company shall pay interest for the same, at the rate of Seven per cent. per annum.

It is further agreed that the time of either party, when devoted

to the special interests of the Company, shall be allowed such compensation for his services as may be hereafter agreed upon.

GEO. N. FLETCHER.
WILLIAM WHITE.
JAMES CAMPBELL.

Witness:
H. W. HARRINGTON.

Boston, Sept. 1, 1858.

The foregoing is Exhibit F.F. attached to my award of April, Eighteen hundred and Ninety-four.
(Signed) WILLIAM L. PUTNAM.

BOSTON, *May 5th*, 1894.

Hon. Wm. L. Putnam.

DEAR SIR: The Counsel for Mrs. Brown, and Mr. & Mrs. Brown themselves, have carefully examined the award, and the following suggestions are made in their behalf.

We would like to have the second article provide that Mr. Fletcher shall account for all moneys or property received by him prior to August 15, 1871, in payment or exchange for lots sold prior to August 15, 1871, which do not appear to have been accounted for by him to Mr. White, because we fear he may have sold lots before that date, for which he did not account to Mr. White, and because there can be no injustice to Mr. F. in this, since the facts are within his knowledge, and the books should show the transactions, and the record shows all the lots he owned.

If any was sold he can show when he received the pay-
238 ments, & when & how he accounted for them? We suggest that Article 4 should provide that he must account to Mrs. Brown for property as well as money received; and we make the suggestions also as to this article that we made as to Article 2.

As to interest we think it should be allowed with annual rests from the beginning of the bill until damages are allowed to Mrs. B. for the injury she suffered from the acts of Mr. F. which have so long deprived her of her inheritance, and put her to such large expense & suffering.

I am instructed also to say that it seems to our clients since you have not specifically referred to the question of conspiracy, that it may have escaped your notice and if so we would like a finding in regard to it.

Also it seems that as to the Harbor & Imp. Stock, we suggest that it seems to us upon the uncontested evidence that Fletcher took the stock from Mrs. White in execution of a contract he made with Mr. White before his death and gave her his note for $5,250 therefor and retained the stock, keeping it from the Administrator though all White's property in his hands was demanded from him by the Administrator, and converted it to his own use, when it had a value which the administrator could have sold it for of said sum of $5,250. If it had no value then it had none when F. sold it to

White, and in that case he should pay the 4200 back which W. paid for it to him. One of these propositions must be true, either F. should pay what he agreed to pay W. for the stock, and what he attempted to pay Mrs. W. for it; or, second, he had converted it to his own use & withheld it from the administrator, and he is liable for the value at the time of the conversion; or, third, he sold worthless stock to W. & should pay back the money received for it with interest.

See evidence referred to in Complts' Argument, vol. 2, pp. 276 to 295.

239 We do not see that you have made any finding or award as to the costs of the suit & expenses of the arbitration.

Should not the award determine which party shall pay them, finally? Or did you think it better to leave the matter to await the final award on the accounting?

Yours truly,

(S'g'd) GEO. WM. ESTABROOK.

Exhibit G. attached to my award of April 1894.

(Signed) WILLIAM PUTNAM.

BOSTON, 13 *May*, 1894.

MY DEAR JUDGE PUTNAM: I had hoped to hear from Mr. Dickinson in regard to any suggestions for charges in detail of your award. I have seen Mr. Fletcher, however, and we wish the following changes.

1. The accounitng should not be regarded as beginning with the settlement of the account of August 15, 1871. At that time, as I understand, Fletcher had made improvements which he did not charge in that account, either because the time for the settling those items had not arrived, or for some other sufficient reason.

In other words, if in that account there were omissions as to any of the lots, those lots should now be accounted for.

It is, I believe, true, that Fletcher in accounting did not consider *all the lots* to be owned with White, as, indeed, he had always maintained. Even if he was mistaken and if that mistake caused the inadequacy of the amount, still, it should now be corrected, and the account be made up on the ground of your award.

2. By the contract, either party making advances beyond his proportional amount, is to be allowed interest at the rate of Seven *per cent.* upon them.

3. "The time of either party when devoted to the special
240 interests of the Company, shall be allowed such compensation for his services as may be hereafter agreed upon," by the same contract. No agreement having been made *quantum Meruit* should be allowed.

Yours truly,

(Sgd.) J. LOWELL.

Exhibit H. attached to my award of April 1894.

(Signed) WILLIAM L. PUTNAM.

And it further appearing that, pending the proceedings for an accounting undertaken by the parties before the said William L. Putnam, pursuant to the said preliminary award, and before the same was concluded, to wit, on the sixth day of November, in the year eighteen hundred and ninety-nine, the said George N. Fletcher died, testate, at his domicile, in the County of Wayne, in the State of Michigan.

And it further appearing that the last will and testament of the said George N. Fletcher was duly probated in said County of Wayne, State of Michigan, and Frank W. Fletcher and Allan M. Fletcher, the executors therein named qualified and took upon themselves the duties of such executors, and that by and under the said last will and testament the said Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, children and heirs at law of said George N. Fletcher deceased, succeeded to the residuary estate of said George N. Fletcher deceased, in equal shares.

And it appearing further to the Court, that the Counsel of record in this cause, who had represented the said George N. Fletcher in his life time, withdrew his appearance from said cause after the death of the said George N. Fletcher, and no appearance has been since entered in this cause for his said children and legal representatives, except that an administrator with the will annexed has been
241 appointed in the State of Massachusetts, who has appeared in this cause.

And it further appearing, in order that the hearings before said William L. Putnam might properly proceed and a final decree be entered in this cause as contemplated by the said covenant or articles of submission and reference on the petition of the plaintiff duly filed, on, to wit, the fourth day of October in the year Nineteen hundred and one, the following order was duly made by this Court:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

No. 26.

SPALDING, Administrator,
vs.
FLETCHER ET ALS.

Decree.

On the Petition of Frances M. Brown now Plaintiff in said cause for the summoning of additional parties to defend this suit, filed October second, 1901.

It appearing to the Court that upon an agreement of submission and reference between the defendant George N. Fletcher during his life and the plaintiff, dated, April 4, 1892, and by a rule of this court, dated October 18, 1893, this cause was referred to the determination of William L. Putnam, and,

It further appearing that during the life-time of the said George N. Fletcher a report was made by said referee to this court that the plaintiff was entitled to an account, and thereupon hearings were had as to the amount due upon such accounting, and while said hearings were in process the said defendant George N.
242 Fletcher died, and that said George N. Fletcher was a resident of Michigan and left three children, Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher and the last will and testament in which said Frank W. Fletcher and Allan M. Fletcher were named as executors has been probated in said Michigan, said executors have been duly qualified and that by said will and testament the said three children are residuary legatees and devisees of the said defendant George N. Fletcher, and,

It further appearing that in the said agreement of submission and reference the said George N. Fletcher covenanted for his heirs and representatives that he would and his heirs, executors and administrators should faithfully fulfill and perform all the terms, & conditions of any award which may be made by said arbitrator or his substitute or successors, and it was covenanted by all the parties to said agreement of submission and reference that said agreement of submission and reference should forever settle all controversies between all of said parties and that the decease of any party should not revoke said agreement of submission but that said arbitration should continue and the successors of said Spalding and the legal representatives of said Brown and said Fletcher should be bound by the final award therein, and

It further appearing by said agreement of submission and reference that when the final award should be made by said arbitrator either party might apply to the court for a decree to enforce the same, and the same might be enforced by a decree or judgment in any court having jurisdiction of the parties, and that the prevailing party should be entitled to have a decree or judgment entered in the court having jurisdiction over the parties against whom such award might be made in conformity with the award so made as a judgment entered by consent which was thereby given, and

243 It further appearing that by the terms of the rule referring the said cause to the said William L. Putnam, it was provided that if either party neglected to appear on due notice then the reference to proceed *ex parte*, and

It also appearing to the court that the counsel of record who represented said George N. Fletcher during his life-time had withdrawn their appearance and no appearance had been since entered for his children or legal representatives except that an administrator with the will annexed had been appointed in the State of Massachusetts who has appeared and who has not objected to the granting of this petition, and

It further appearing in order that the hearings before said arbitrator may properly proceed and final decree be entered in this cause as contemplated by the said agreement of submission and reference that the said children of the said George N. Fletcher and his executors should be summoned in to defend this suit.

And it further appearing that, pending the proceedings for an accounting undertaken by the parties before the said William L. Putnam, pursuant to the said preliminary award, and before the same was concluded, to wit, on the sixth day of November, in the year eighteen hundred and ninety-nine, the said George N. Fletcher died, testate, at his domicile, in the County of Wayne, in the State of Michigan.

And it further appearing that the last will and testament of the said George N. Fletcher was duly probated in said County of Wayne, State of Michigan, and Frank W. Fletcher and Allan M. Fletcher, the executors therein named qualified and took upon themselves the duties of such executors, and that by and under the said last will and testament the said Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, children and heirs at law of said George N. Fletcher deceased, succeeded to the residuary estate of said George N. Fletcher deceased, in equal shares.

And it appearing further to the Court, that the Counsel of record in this cause, who had represented the said George N. Fletcher in his life time, withdrew his appearance from said cause after the death of the said George N. Fletcher, and no appearance has been since entered in this cause for his said children and legal representatives, except that an administrator with the will annexed has been
241 appointed in the State of Massachusetts, who has appeared in this cause.

And it further appearing, in order that the hearings before said William L. Putnam might properly proceed and a final decree be entered in this cause as contemplated by the said covenant or articles of submission and reference on the petition of the plaintiff duly filed, on, to wit, the fourth day of October in the year Nineteen hundred and one, the following order was duly made by this Court:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

No. 26.

SPALDING, Administrator,
vs.
FLETCHER ET ALS.

Decree.

On the Petition of Frances M. Brown now Plaintiff in said cause for the summoning of additional parties to defend this suit, filed October second, 1901.

It appearing to the Court that upon an agreement of submission and reference between the defendant George N. Fletcher during his life and the plaintiff, dated, April 4, 1892, and by a rule of this court, dated October 18, 1893, this cause was referred to the determination of William L. Putnam, and,

It further appearing that during the life-time of the said George N. Fletcher a report was made by said referee to this court that the plaintiff was entitled to an account, and thereupon hearings were had as to the amount due upon such accounting, and while said hearings were in process the said defendant George N.
242 Fletcher died, and that said George N. Fletcher was a resident of Michigan and left three children, Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher and the last will and testament in which said Frank W. Fletcher and Allan M. Fletcher were named as executors has been probated in said Michigan, said executors have been duly qualified and that by said will and testament the said three children are residuary legatees and devisees of the said defendant George N. Fletcher, and,

It further appearing that in the said agreement of submission and reference the said George N. Fletcher covenanted for his heirs and representatives that he would and his heirs, executors and administrators should faithfully fulfill and perform all the terms, & conditions of any award which may be made by said arbitrator or his substitute or successors, and it was covenanted by all the parties to said agreement of submission and reference that said agreement of submission and reference should forever settle all controversies between all of said parties and that the decease of any party should not revoke said agreement of submission but that said arbitration should continue and the successors of said Spalding and the legal representatives of said Brown and said Fletcher should be bound by the final award therein, and

It further appearing by said agreement of submission and reference that when the final award should be made by said arbitrator either party might apply to the court for a decree to enforce the same, and the same might be enforced by a decree or judgment in any court having jurisdiction of the parties, and that the prevailing party should be entitled to have a decree or judgment entered in the court having jurisdiction over the parties against whom such award might be made in conformity with the award so made as a judgment entered by consent which was thereby given, and
243 It further appearing that by the terms of the rule referring the said cause to the said William L. Putnam, it was provided that if either party neglected to appear on due notice then the reference to proceed *ex parte*, and

It also appearing to the court that the counsel of record who represented said George N. Fletcher during his life-time had withdrawn their appearance and no appearance had been since entered for his children or legal representatives except that an administrator with the will annexed had been appointed in the State of Massachusetts who has appeared and who has not objected to the granting of this petition, and

It further appearing in order that the hearings before said arbitrator may properly proceed and final decree be entered in this cause as contemplated by the said agreement of submission and reference that the said children of the said George N. Fletcher and his executors should be summoned in to defend this suit.

It is ordered that the said Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, children of the said George N. Fletcher and the said Frank W. Fletcher and Allan M. Fletcher, executors of the last will and testament of the said deceased George N. Fletcher, have until one month from the first Monday of October current, being the rule day next succeeding the date of this order, to appear in said cause, and upon default of appearance by that date that this cause proceed before the arbitrator *ex parte* as to such parties.

WILLIAM CALEB LORING,
Justice S. J. C.

Oct. 4, 1901.

And afterwards, to wit, on the tenth day of October in the year nineteen hundred and one, a supplemental order was duly entered in said cause, which supplemental order was in the words and figures following, to wit,

244 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

RUFUS H. SPALDING, Adm'r,
vs.
GEORGE N. FLETCHER ET AL.

Supplemental Order.

In the above entitled cause, it is further ordered that the notice to be given to Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, children of George N. Fletcher, and to the said Frank W. Fletcher and Allan M. Fletcher, executors of the will of said George N. Fletcher by the order dated October 4, 1901, be given by serving each with a certified copy of said order fourteen days, at least, before the seventh day of November next.

By the Court,

C. H. HOOPER,
Ass't Clerk.

October 10, 1901.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

I, John Noble, Clerk of said Court, hereby certify that the foregoing are true copies of the Decree of October 4, 1901, and of the Supplemental Order of October 10, 1901, in the case of Spalding, Adm'r *v.* Fletcher *et al.*

I further certify that a return of service in accordance with said order has been filed; and that no appearance in behalf of the persons named therein has been entered in the Clerk's Office of said Court.

In Witness Whereof, I have hereunto set my hand and
245 affixed the seal of said Court, this 21st day of November, A. D. 1901.

[SEAL.] (Signed) JOHN NOBLE, *Clerk.*

And due proof of service in accordance with said order having been duly filed in this cause and no appearance on behalf of the persons named in said order having been entered in accordance with said order, afterwards, to wit, on the twenty-fourth day of January, in the year nineteen hundred and two, a further order was duly made and entered in said cause, in the words and figures following, to wit:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

No. 26.

SPALDING, Adm.,
vs.
FLETCHER ET ALS.

Due and sufficient service having been made upon Frank W. Fletcher, Allan M. Fletcher, individually and as executors of the will of George N. Fletcher, and Grace Fletcher of notice of the order made and entered in this suit on the fourth day of October, 1901, and proof of the same being now on file; and it satisfactorily appearing to the Court that neither of said above named persons have caused any appearance to be entered in this suit; and it further appearing that the time limited for the entry of such appearance has expired;

On motion of the plaintiff's attorney it is ordered that the default of the said Frank W. Fletcher, Allan M. Fletcher, individu-
246 ally and as executors of the will of George N. Fletcher, and Grace Fletcher for such non-appearance be, and the same is hereby entered; and

It is further ordered that Hon. William L. Putnam the Arbitrator in this cause be, and he is hereby authorized and directed to proceed *ex parte* in accordance with the terms of the order of this court of said date above referred to.

By the Court,
(Signed) JOHN NOBLE, *Clerk.*

January 24, 1902.

A true copy, Attest.
[SEAL.] C. H. COOPER,
Ass't Clerk.

And it appearing that such proceedings were thereafter had before the said Aribtrator or referee, that afterwards, to wit, on the fifth day of February in the year nineteen hundred and three, the

said William L. Putnam as such arbitrator or referee made and filed in this cause his final report or award.

And it further satisfactorily appearing to the Court, that by proper and regular proceedings in this cause Albert W. Brown has been substituted for the said Rufus H. Spalding, administrator, deceased, as the plaintiff in this cause and has succeeded to all of the rights and interest of the said Rufus H. Spalding, administrator, and has also succeeded to all of the rights and interest of Frances M. Brown, who appeared and became a party to this cause after the filing of the bill of complaint therein, and who has since deceased:

Now, therefore, upon consideration thereof, it is ordered, adjudged and decreed that the preliminary award of the said William L. Putnam, in this cause, filed on the twenty-second day of May
247 in the year eighteen hundred and ninety-two, be and the same is hereby in all respects confirmed; and that the final award of the said William L. Putnam in this cause, filed on the fifth day of February in the year nineteen hundred and three, be and the same is hereby in all respects confirmed.

And it is further ordered, adjudged and decreed that Frank B. Cotton, as he is the administrator with the will annexed *de bonis non* of the estate of the said George N. Fletcher, deceased, be, and he is hereby ordered and directed to pay to Albert W. Brown, the now plaintiff in this suit in accordance with said final award the full sum of three hundred and ninety-four thousand three hundred and seventy-two dollars and eighty-seven cents ($394,372.87/100) awarded to be paid by the final award of the said William L. Putnam, with interest thereon from the fifth day of February, in the year nineteen hundred and three, the date of the filing of said final award, at the rate of six per cent. per annum, amounting at the date of entry of this decree to the sum of four thousand and four hundred and ninety-five dollars and eighty-five cents ($4,495.85/100); together with the costs of this suit to be taxed herein, with interest upon the whole sum thereof at the rate of six per cent. per annum from the date of the entry of this decree.

And it is further ordered, adjudged and decreed, for the purpose of enabling the plaintiff to enforce the covenants of said submission, that the executors of the last will and testament of the said George N. Fletcher are bound to abide by and perform the final award of the said William L. Putnam, and are liable to pay unto the said Albert W. Brown, the now plaintiff in this suit, in accordance with said final award, the full sum of three hundred and ninety-four thousand three hundred and seventy-two dollars and eighty-seven cents ($394,372.87/100) awarded to be paid by the final
248 award of the said William L. Putnam, with interest thereon from the fifth day of February, in the year nineteen hundred and three, the date of the filing of said award, at the rate of six per cent. per annum, amounting at the date of the entry of this decree to the sum of four thousand four hundred and ninety-five dollars and eighty-five cents ($4,495.85/100), together with the costs of this suit to be taxed herein, with interest upon the whole sum thereof at the rate of six per cent. per annum from the date of the entry of this decree.

And it is further ordered, adjudged and decreed, for the purpose of enabling the plaintiff to enforce the covenants of said sumbission, that the said Frank W. Fletcher's Allan M. Fletcher and Grace Fletcher as the legal representatives of the said George N. Fletcher, deceased, are bound to abide by and perform the final award of the said William L. Putnam, and are liable to pay unto the said Albert W. Brown, the now plaintiff, such part of the full sum of three hundred and ninety-four thousand three hundred and seventy-two dollars and eighty-seven cents ($394,372.87/100) awarded to be paid by the final award of the said William L. Putnam, with interest thereon from the fifth day of February in the year nineteen hundred and three, the date of the filing of said final award, at the rate of six per cent. per annum, amounting at the date of the entry of this decree to the sum of four thousand and four hundred and ninety-five dollars and eighty-five cents ($4,495.85/100), together with the costs of this suit to be taxed herein, with interest upon the whole sum thereof at the rate of six per cent. per annum from the date of the entry of this decree, as may be unsatisfied after applying such part of the estate of the said George N. Fletcher deceased, as may remain undistributed in the hands of the said administrator or executors of his said last will and testament.

249 And the Court doth further order, adjudge and decree that the plaintiff in this suit do recover all of his costs in this suit to be taxed by the clerk in accordance with the rules and practice of this court.

And it is further ordered, adjudged and decreed that the bill of complaint in this cause and all proceedings thereunder be and the same is hereby dismissed as to the defendants, James Campbell and Eliza White.

By the Court

JOHN NOBLE, *Clerk.*

April 14, 1903.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

26 Equity.

SPALDING
v.
FLETCHER.

Plaintiff's Costs.

Bill	.50
Entry	3.00
Service	12.48
Term fees	15.00
Travel	19.47
Att'ys fee	2.50
Copies	4.30

Services of G. M. Reed, Com'r	1584.00
" " J. Miner "	3000.00
" " J. A. Hillery "	20.00
Printing	98.00
Copies	326.15
Recording	300.09
	$5385.40

Taxed and allowed

JOHN NOBLE, *Clerk.*

250 (*Docket Entries.*)

RUFUS H. SPAULDING, Adm'r,
v.
GEORGE N. FLETCHER ET AL.

A. Russ. L. Mason.

1874, April Term.
July 6. Time for filing answer extended as on file.
July 13. Answer filed.
Sept. Term.
Nov. 23. Geo. M. Reed Esq., Commissioner to take testimony as on file.

1875, Sept. Term.
Sept. 23. John Miner of Detroit, Michigan, appointed to take testimony of Geo. N. Fletcher by order on file.
Feb. 10. Plaintiff's motion as to custody of books, &c. filed.
" " Order as to retention of certain of Fletcher's books in custody of John Miner, and as to the production of others, &c., as on file.

1878, Sept. Term.
Sept. 11. Return file of John Miner, Com'r to take testimony of defe't Fletcher with books &c.
" 12. Complainant's motion for leave to inspect books &c.
Nov. 2. Decree as to books and papers brought by John Miner, Com'r from Detroit, as on file.—with stipulation.
Nov. 4. Said books & Papers sent by Adams Ex. Co. to Miner.

251

1879, April Term.
April 24. Order of reference to F. W. Hurd as Master.
June 13. Suggestions of insolvency of James Campbell &c., filed.

1882, Sept. Term.
Jan'y 12. Evidence taken before Geo. M. Reed, Com'r &c., filed.
" " Agreements as to exhibits filed. J. Lowell for G. N. Fletcher.

1887.

Aug. 31. Master's Report filed
Obj. before Master filed therewith.

Sept. 14. Def't Fletcher's exc. to Master's Report filed. Richardson & Hale for J. Starrett & for Starrett & Ritchie, Assignees.
D. A. Dorr.
R. Lund.
G. W. Estabrook.

1889.

Dec. 7. Order of recommittal to Master, as on file.

1891.

April 15. Master's report upon recommittal filed.

April 30. Defendant's exc. to same filed.

May 15. Suggestion of death of def't Jas. Campbell & motion to summon in representatives &c., filed & allowed.

252 Citation issued accordingly ret. 1st Mon. June.

June 3. Answer of J. Starrett filed.

1892.

June 6. Amendment of bill filed by consent.
" " Answer of F. M. Brown filed by consent.
" " Agreement to submit to arbitration filed.
" " Rule to Referee (W. C. Endicott) issued.

1893.

Oct. 18. Motion to revoke previous appointment of arbitrator filed & granted.
Order of reference issued to W. L. Putnam, as on file.
" " Suggestion of death of R. H. Spaulding, Adm'r & motion of his successor to be allowed to prosecute suit filed & allowed.

1894.

May 22. Report of Referee filed. F. N. Nay with. May 1, 1900.

1895.

Jan. 25. Defendant's account filed.

Apr. 27. Objections of F. M. Brown to account of defendant Fletcher filed.

1898.

Nov. 16. Powers of Attorney by F. M. Brown to A. W. Brown filed.

1899.

Mar. 7. Motion for issuing of Commission, filed and allowed.

253

Apr. 21. Agre't to extend time for taking depositions in Michigan to July 1, filed and allowed.

June 23. Motion to extend time for taking depositions filed & allowed.

July 31. Motion to extend time for taking depositions filed.

Aug. 1. Motion allowed. W. B. Grant for Cotton Adm'r.

1899.
Aug. 15. Motion to further extend time for taking depositions filed & allowed.
Sept. 15. Motion to further extend time for taking testimony filed & granted.
Sept. 23. Defendant's motion for commission to take depositions filed Oct. 3, granted.
Oct. 3. Motion to further extend time for taking depositions filed & allowed.
Oct. 20. Motion to further extend time for taking depositions filed & granted.
" " Defendant's motion to extend commission for taking depositions filed and granted.
" 31. Motion to further extend time for taking testimony filed & granted.

1900.
Apr. 27. Motion for citation filed & allowed.

254
" " Citation issued ret. 1st Mon. June.
July 14. Agreement as to copies of deeds filed.
" 17. Motion for special Com'ns filed & allowed.
" 18. Commissions issued accordingly.

1901.
Mar. 15. Statement of account filed by pl'ff.
May 20. Petitions of F. M. Brown Adm'x, to bring in heirs of Fletcher as parties def't, filed.
Aug. 26. Amended petition to bring in heirs of Fletcher filed.
Sept. 23. Mem. of decision as on file.
Oct. 2. Petition to summon in ex'ors &c., of def't Fletcher filed.
Oct. 4. Decree thereon as on file.
" 10. Supplemental order as on file.

1902.
Jan. 24. Order of Court as on file.
Dec. 30. Suggestion of Death of F. M. Brown Adm'x, &c., filed, and motions of A. W. Brown, as Adm'r &c., (3) to be admitted as party filed & allowed.

1903.
Feb. 5. Award of arbitrator filed.
" 10. Award opened in Court on motion & by order of Court, no party objecting.
Apr. 14. Final Decree, as on file.

255 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

I, John Noble, Clerk of said Court, hereby certify that the foregoing are true copies of the Bill of Complaint (filed April 24, 1874); Subpœna; Answer of Deft. Fletcher; Answer of deft. Campbell;

Answer of deft. White; Order of Reference to Master; Master's Report; Objections to Master's Report; Order of Recommittal to Master; Master's Report upon recommittal; Exceptions to Master's Report; Motion to summon in Representatives of deft. Campbell; Answer of Executor of Campbell's will; Agreement of Arbitration; Amendment to Bill; Answer of deft. Brown; Agreement of Reference to W. C. Endicott; Order of Reference to W. C. Endicott; Agreement of Reference to W. L. Putnam; Order of Reference to W. L. Putnam; Suggestion of Plff's death and motion of his successor to appear; First Report of Referee; Motion to summon in Administrator of Def't Fletcher; Citation to F. B. Cotton, Administrator; Return of Service of Citation; Petition of plff. to summon in Executors and Heirs of deft. Fletcher; Decree thereon; Supplemental Order; Return of Service of Summons on F. W. Fletcher; Return of Service of Summons on F. W. Fletcher, Executor; Return of Service of Summons on A. M. Fletcher; Return of Service of Summons on A. M. Fletcher, Executor; Return of Service of Summons on G. Fletcher (King); Order of Court; Motion of A. W. Brown, Administrator of estate of W. White, to intervene; Motion of A. W. Brown, Executor of F. M. Brown, to intervene; Motion of A. W. Brown, Legatee of F. M. Brown, to intervene; Award of Arbitrator; Final Decree; Taxation of Costs; and Docket Entries; in the case of Rufus H. Spalding, Adm'r, *vs.* George N. Fletcher *et al.*

256 In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this fifth day of September A. D. 1903.

[SEAL.]

JOHN NOBLE, *Clerk.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

I, John Noble, Clerk of the Supreme Judicial Court within and for said County of Suffolk, hereby certify that the Honorable Marcus Perren Knowlton, by whom the foregoing certification was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is Chief Justice of the Supreme Judicial Court of said Commonwealth, duly commissioned and qualified; to all of whose acts as such full faith and credit are and ought to be given, as well in courts of judication as elsewhere.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this fifth day of September in the year of our Lord one thousand nine hundred and three.

[SEAL.]

JOHN NOBLE, *Clerk.*

EXHIBIT 3.

(*Record of Proceedings in re Estate of Geo. N. Fletcher, Dec., in Probate Court of Middlesex Co., Mass.*)

COMMONWEALTH OF MASSACHUSETTS, *Middlesex, ss:*

Probate Court.

I, Charles J. McIntire, Esquire, first Judge of the Probate Court within, and for the County of Middlesex, hereby certify that
257 Samuel H. Folsom, whose signature is affixed to the annexed certificate and attestation, is the Register and proper certifying officer of said Court, and has, by law, the custody of the seal, and all the records, books, documents, and papers of or appertaining to said Court, and that said certificate and attestation are in due form, and entitled to full faith and credit.

In witness whereof, I have hereunto set my hand, this thirteenth day of January in the year of our Lord one thousand nine hundred and four.

[SEAL.] CHAS. J. McINTIRE,
First Judge of Probate Court.

I, Samuel H. Folsom, Register of the Probate Court for said County of Middlesex, do hereby certify that Charles J. McIntire, whose name is subscribed to the above certificate, is the First Judge of said Probate Court, duly appointed, sworn, and qualified, and that the signature of said Judge to said certificate is genuine.

In witness whereof, I have hereunto set my hand and the seal of said Court, this thirteenth day of January in the year of our Lord one thousand nine hundred and four.

S. H. FOLSOM,
Register of Probate Court.

COMMONWEALTH OF MASSACHUSETTS, *Middlesex, ss:*

[SEAL.] Probate Court.

I, Samuel H. Folsom, Register of the Probate Court for said County of Middlesex, having, by law, the custody of the seal and all the records, books, documents, and papers of or appertain-
258 ing to said Court, hereby certify the papers hereto annexed to be true copies of the papers appertaining to said Court, and on file or of record in the office of said court, to-wit: The Petition, Citation and Decree for Allowance of Foreign Will, Bond, Inventory, Petition for License to sell Real Estate, List of Debts, and Decree, and the First & Final Account of Administrator with the will annexed of George N. Fletcher, late of Detroit, in the State of Michigan, deceased.

In witness whereof, I have hereunto set my hand and the seal

of said Court this thirteenth day of January in the year of our Lord one thousand nine hundred and four.

S. H. FOLSOM, *Register.*

To the honorable the judges of the Probate Court in and for the County of Middlesex:

Respectfully represents Frances M. Brown, of Boston, in the County of Suffolk, and State of Massachusetts, that the last will and testament of George N. Fletcher, late of Detroit, in the County of Wayne, and State of Michigan, deceased, testate, has been duly proved and allowed by the Probate Court in and for the County of Wayne according to the laws of said State of Michigan, a copy of which will, and of the probate thereof, duly authenticated, are herewith produced; that said testator at the time of his decease, had estate in said County of Middlesex, on which said will may operate; that the same ought to be allowed in this State as the last will and testament of said deceased; that your petitioner is administratrix *de bonis non* of the estate of William White, deceased, late of said Boston, and sole heir at law of said William White, and as such is a creditor of the estate of George N. Fletcher, and
259 therefore prays, that the copy of said will may be filed and recorded in the Registry of Probate in said County of Middlesex, pursuant to the statute in that case made and provided; and that letters of administration with the will annexed may be granted thereon to Frank B. Cotton, of Brookline, in the County of Norfolk, or such other person as the court may deem fit, unless the executors, Frank W. Fletcher and Allen M. Fletcher (both of Alpena, Michigan) within twenty days after the Probate of said will, appear and give bond according to law and certifies that the statements made in the foregoing petition are true to the best of her knowledge and belief. Your petitioner does not desire to assume said trust.

Dated this thirty-first day of January, A. D. 1900.

FRANCES M. BROWN.

MIDDLESEX, *ss:*

Subscribed and sworn to this 31st day of January, A. D. 1900. Before me,

WALTER B. GRANT,
Justice of the Peace.

COMMONWEALTH OF MASSACHUSETTS, *Middlesex, ss:*

Probate Court.

To the heirs-at-law, next of kin, and all other persons interested in the estate of George N. Fletcher, late of Detroit, in the County of Wayne and State of Michigan, deceased:

Whereas, a petition has been presented to said Court, by Frances M. Brown, of Boston, in our County of Suffolk, with certain papers purporting to be copies of the last will and testament of said deceased, and of the probate thereof in said State of Michigan, duly

authenticated, representing that at the time of his death, said
260 deceased had estate in said County of Middlesex, on which said will may operate, and praying that the copy of said will may be filed and recorded in the Registry of Probate of said County of Middlesex, and letters of administration with the will annexed thereon granted to Frank B. Cotton of Brookline in our County of Norfolk, or some other suitable person unless Frank W. Fletcher and Allan M. Fletcher, both of Alpena, in said State of Michigan, the executors named in said will, within twenty days from the probate thereof appear and give bond according to law.

You are hereby cited to appear at a Probate Court, to be held at Cambridge, in said County of Middlesex, on the sixth day of February, A. D., 1900, at nine o'clock in the forenoon, to show cause, if any you have, why the same should not be granted.

And said petitioner is hereby directed to give public notice thereof, by publishing this citation once in each week, for three successive weeks in the Boston Traveler, a newspaper published in Boston, the first publication to be thirty days, at least, before said Court, and also by delivering or mailing postpaid to each of said executors a copy of this citation fourteen days at least before said Court.

Witness, Charles J. McIntire, Esquire, First Judge of said Court, this thirty-first day of January in the year one thousand nine hundred.

S. H. FOLSOM, *Register.*

I have served the foregoing citation as therein ordered, both by publication and by mailing copies to each of said executors.

FRANCES M. BROWN.

MIDDLESEX, *ss:*

Cambridge, Mar. 6th, A. D., 1900.—Then personally appeared Frances M. Brown and made oath that the above return by her subscribed is true.

Before me,

WILLIAM H. MULLIN,
Justice of the Peace.

261 COMMONWEALTH OF MASSACHUSETTS, *Middlesex, ss:*

At a Probate Court holden at Cambridge in and for said County of Middlesex, on the sixth day of March, in the year of our Lord one thousand nine hundred.

On the petition of Frances M. Brown, of Boston, in the County of Suffolk, praying that a copy of the last will and testament of George N. Fletcher, late of Detroit, in the State of Michigan, deceased, testate, may be filed and recorded in the Registry of Probate of this County; and letters of administration with the will annexed issued to Frank B. Cotton, of Brookline, in our County of Norfolk, or some other suitable person, unless Frank W. Fletcher and Allan M. Fletcher, the executors named therein, within twenty days from the probate thereof, appear and give bond according to law; a copy of

said will, and of the probate thereof, duly authenticated, having been produced therewith, and public notice having been given, according to law and the order of court; and it appearing that there is estate of said deceased in said County of Middlesex, on which said will may operate; and that the original will has been proved and allowed in the State of Michigan, according to the laws of said State, and that it ought to be allowed in this Commonwealth as the last will and testament of said deceased; it is therefore ordered that the copy of said will be filed and recorded in the Registry of Probate of said County of Middlesex, pursuant to the statute in that case made and provided; and that letters of administration with the will annexed be granted to said Cotton unless said executors within twenty days from this date appear and qualify by giving bond according to law, he first giving bond with sufficient sureties for the faithful discharge of said trust.

GEO. F. LAWTON,
Judge of Probate Court.

262 (Endorsed on back:) 52109 George N. Fletcher Allowance of Foreign Will and Letters. Petition—Citation—Decree. Filed Jan. 31, 1900. Returnable M'ch 6, 1900. Allowed M'ch 6, 1900. Rec. Book 590, Page 44. Will Book 613, Page 67. For Petitioner:—E. S. Fernald, Attorney at Law, 15 Court Square, Boston, Mass. For Respondent:— —— ——.

Know all men by these presents, that we, Frank B. Cotton, of Brookline, in the County of Norfolk, as principal, and the Fidelity & Deposit Company, of Maryland, a corporation, duly established by law and having an usual place of business in Boston, in the County of Suffolk, as surety, and all within the Commonwealth of Massachusetts, are holden and stand firmly bound and obliged unto Charles J. McIntire, Esquire, First Judge of the Probate Court in and for the County of Middlesex, in the full and just sum of Five Hundred (500) dollars, to be paid to said Judge and his successors in said office; to the true payment whereof we bind ourselves and each of us, our and each of our heirs, executors, successors, assigns and administrators, jointly and severally by these presents.

263 Sealed with our seals, and dated the 9th day of March, in the year of our Lord one thousand nine hundred.

The condition of this obligation is such that if the above bounden, Frank B. Cotton, administrator with the will annexed of the estate of George N. Fletcher, late of Detroit, Michigan, in County of Wayne, deceased, testate, shall:

First, make and return to said Probate Court, within three months after his appointment, a true inventory of all the real and personal estate of said deceased which at the time of the making of such inventory shall have come to the possession or knowledge of said administrator;

Second, administer according to law and to the will of said deceased all the personal estate of said deceased which may come to the possession of said administrator, or of any person for him, and

also the proceeds of any of the real estate of said deceased that may be sold or mortgaged by said administrator; and

Third, render upon oath, a true account of his administration at least once a year, until his trust is fulfilled, unless he is excused therefrom in any year by said Court, and also render such account at such other times as said Court may order; then this obligation to be void, otherwise to remain in full force and virtue.

FRANK B. COTTON, [SEAL.]
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By HARRISON HUME,
Resident Vice-President.

Signed, sealed and delivered in presence of
[CORP. SEAL.] W. B. GRANT.

Attest:
HENRY E. RUSSELL,
Resident Assistant Secretary.

264 MIDDLESEX, *ss:*

MARCH 29, A. D. 1900.

Examined and approved.

GEO. F. LAWTON,
Judge of Probate Court.

I, Frank B. Cotton, the within named administrator, declare that, to the best of my knowledge and belief, the estate and effects of the within named deceased do not exceed in value the following mentioned sums, viz.:

Real Estate $200.00
Personal Estate ..... $ None.

FRANK B. COTTON.

(Endorsed on back:) 52109. George N. Fletcher, Administrator's Bond. (Will annexed.) (With Sureties.) Approved M'ch 29, 1900. Rec. Book 590, Page 44.

COMMONWEALTH OF MASSACHUSETTS, *Middlesex, ss:*

Probate Court.

[SEAL.] To Eliot Glover, John F. Libby and Louis L. G. de Rochemont, Greeting:

You are hereby appointed to appraise, on oath, the estate and effects of George N. Fletcher, late of Detroit, in the State of Michigan, deceased, testate, which may be in said commonwealth. When you have performed that service, you will deliver this order, with your doings in pursuance thereof, to Frank B. Cotton, administrator,

with the will annexed, of the estate of said deceased, that
265 he may return the same to the Probate Court for said County of Middlesex.

Witness my hand and the seal of said court, this twenty-ninth day of March, in the year of our Lord one thousand nine hundred.

S. H. FOLSOM,
Register of Probate Court.

MIDDLESEX, *ss:*

June 20, 1902, A. D.—Then the above named appraisers personally appeared and made oath that they would faithfully and impartially discharge the trust reposed in them by the foregoing order.

Before me,
WALTER B. GRANT,
Justice of the Peace.

Pursuant to the foregoing order to us directed we have appraised said estate as follows, to-wit:

Amount of personal estate, as per schedule exhibited..... $
Amount of real estate, as per schedule exhibited..... $400.00

ELIOT GLOVER,
JOHN F. LIBBY,
LOUIS L. G. DE ROCHEMONT,
Appraisers.

MIDDLESEX, *ss:*

June 20, A. D. 1902.—Then personally appeared Frank B. Cotton, the administrator with the will annexed of said estate, and made oath that the foregoing is a true and perfect inventory of all the estate of said deceased that has come to his possession or knowledge.

Before me,
WALTER B. GRANT,
Justice of the Peace.

Schedule of Personal Estate in Detail.

Certain books and papers of testator in the Commonwealth of Massachusetts in evidence in case Spalding *vs.* Fletcher pending in Supreme Court for County of Suffolk, said Commonwealth of uncertain value.

Schedule of Real Estate in Detail.

One lot of land in Everett, Middlesex County, Mass., being lot No. 93, Vale street, containing 6375 square feet, assessed at $200. Value $200.00

266 One lot of land in Everett, Middlesex County, Mass., being lot No. 93, Fifth street, containing 6375 square feet, assessed at $200. Value 200.00

Total $400.00

(Endorsed on back:) 52109. George N. Fletcher, Administrator's Inventory. Filed July 1st, 1902. Rec. Book 634, Page 349. Walter B. Grant, Attorney at Law, 15 Court Square, Boston.

To the Honorable the Judges of the Probate Court in and for the County of Middlesex:

Respectfully represents Frank B. Cotton, administrator with the will annexed of the estate of George N. Fletcher, late of Detroit, in the State of Michigan, deceased:

That the debts due from the deceased, as nearly as they can now be ascertained, as shown by the list herewith filed amount to	$415396.28
The legacies given in said will to	
And the charges of administration to	1025.50
Amounting in all to	$416421.78
That the value of the personal estate in the hands of the petitioner (exclusive of the widow's allowance) is)	$
That the personal estate is therefore insufficient to pay the debts—legacies—of the deceased and the charges of administration, and it is necessary for that purpose to sell some part of the real estate to raise the sum of	$416421.78

That the real estate which the petitioner proposes to sell consists of the following parcel, to-wit:

267 A certain parcel of land situate in Everett, formerly Malden, in the County aforesaid being lot numbered ninety-three (93) on Fifth Street as laid down on a plan of land of Winnisimmet Company and others in Chelsia and Malden by J. H. Shearer, Engineer 1846, which plan is recorded with Suffolk and Middlesex Counties' deeds, being the premises conveyed by Atlantic Wharf Company to said George N. Fletcher by deed recorded with Middlesex South District deeds, book 824, page 59.

Also a certain other lot of land situated in said Everett formerly Malden, being lot numbered ninety-three (93) on Vale Street as laid down on said plan of lands, and being the premises conveyed by Atlantic Wharf Company to said Fletcher by deed recorded with Middlesex South District deeds, book 829, page 519, and that by a partial sale thereof the residue would be greatly injured.

Wherefore your petitioner prays that he may be licensed to sell the whole of said parcel at public auction for the payment of said debts and charges of administration.

Dated the thirtieth day of September, A. D. 1903.

FRANK B. COTTON.

The undersigned, being all the persons interested, hereby assent to the foregoing petition.

—— ——. —— ——.

—— ——. —— ——.

268 COMMONWEALTH OF MASSACHUSETTS, *Middlesex, ss:*

Probate Court.

A List of Debts which Appear to be Due from the Estate of George N. Fletcher, Late of Detroit, in the State of Michigan, Deceased.

Name of creditor.	Residence or usual place of business.	Nature of debt.	Amount.
City of Everett.....	Everett, Mass.....	Taxes 1901, 1902 and 1903	$25.11
Albert W. Brown, Adm. *d. b. n.* of Estate of Wm. White & Executor of Will of Frances M. Brown.	Boston, Mass.....	Judgment by decree Sup. Jud. Ct. in Equity suit, Spalding *vs.* Fletcher, and interest to Sept. 30, 1903.	415371.17
			$415396.28

Administration Debts.

Frank B. Cotton	Brookline, Mass...	Adv. Probate Notice.....	4.00
" " "	" " ..	Premiums Probate Bond.	20.00
" " "	" " ..	C'tf's of Appointment for use in Court.	1.50
Walter B. Grant	Boston, Mass.....	Attorneys' fees.....	500.00
Frank B. Cotton, Adm. *c. t. a.*	Brookline, Mass...	Adm'r fees..	500.00
			$1025.50

FRANK B. COTTON,
Administrator.

SUFFOLK, *ss:*

BOSTON, *October* 6, *A. D.* 1903.

Then personally appeared Frank B. Cotton and made oath that the above statement, by him subscribed, is true to the best of his knowledge and belief.

Before me,

WALTER B. GRANT,
Justice of the Peace.

269 COMMONWEALTH OF MASSACHUSETTS, *Middlesex, ss:*

At a Probate Court holden at Cambridge in and for said County of Middlesex, on the twenty-seventh day of October, in the year of our Lord one thousand nine hundred and three.

On the petition of Frank B. Cotton, administrator with the will annexed of the estate of George N. Fletcher, late of Detroit, in the State of Michigan, deceased, praying for license to sell the real estate of said deceased, described in said petition, at public auction, for the payment of debts, and charges of administration, and for other reasons; all persons interested having been duly notified and no person objecting, and it appearing that it is necessary to sell some part of the real estate of said deceased, for the payment of his debts, and charges of administration, the personal estate being insufficient therefor, and that by a partial sale thereof the residue of said parcels would be greatly injured:

It is decreed, that the petitioner be licensed to sell at public auction the whole of said parcels of real estate.

CHAS. J. McINTIRE,
Judge of Probate Court.

(Endorsement on back:) 52109. George N. Fletcher Sale of Real Estate. (Administrators) (Public) Petition—Decree.
270 Filed Oct. 7, 1903. Returnable Oct. 27, 1903. Allowed Oct. 27, 1903. Rec. Book 621, Page 136. For Petitioner:—Walter B. Grant, Attorney at Law, 15 Court Square, Boston. For Respondent: —— ——.

The first and final account of Frank B. Cotton, of Brookline, administrator with the will annexed of the estate of George N. Fletcher, late of Detroit, in the State of Michigan, deceased.

This account is for the period beginning with the sixth day of March, A. D. 1900, and ending with the fifteenth day of December, A. D. 1903.

Said accountant charges himself with the several amounts received, as stated in Schedule A, herewith exhibited	$350.00
and asks to be allowed for sundry payments and charges as stated in Schedule B, herewith exhibited.....	350.00
Balance as stated in Schedule C, herewith exhibited....	None.

FRANK B. COTTON,
Administrator With the Will Annexed.

COMMONWEALTH OF MASSACHUSETTS, *Middlesex, ss:*

At a Probate Court held at Cambridge in said County, on the seventh day of January, A. D. 1904.

The foregoing account having been presented for allowance, and verified by the oath of the accountant, and all persons interested having been duly notified, and no objections being made thereto, and the same having been examined and considered by the court:

It is decreed that said account be allowed.

CHAS. J. McINTIRE,
Judge of Probate Court.

271 SCHEDULE A.

Amount of personal property, according to inventory or..	$0000.00
Balance of next prior account, Amounts received from income, gain on sale of personal property over appraised value, and from other property, as follows:	
Nov. 25, 1903. Amount received from sale at Public Auction of lots of land No. 93 Fifth Street and No. 93 Vale Street, Everett, Mass...	350.00
	$350.00

SCHEDULE B.

Showing Payments, Charges, Losses and Distributions.

Item.	Date.		
1	M'ch 3, 1900.	Advertisement Probate notice	$4.00
2		Premiums on Probate Bond (1900 to 1904 inc.)	20.00
3		Certificates of Appointment	1.50
4	Nov. 25, 1903.	Pd. Everett Herald advertisement Notice of Sale	5.00
5	Nov. 25, 1903.	Pd. Geo. W. Crawford services as auctioneer	10.00
6	Ap'l 28, 1900.	Pd. Advertisement appointment	2.00
7	Dec. 15, 1903.	Pd. Walter B. Grant on acct. bill for services	200.00
8	Dec. 15, 1903.	Pd. Frank B. Cotton on acct. bill for services as administrator	107.50
			$350.00

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SCHEDULE C.

(This schedule contains items of personal property now in possession of the accountant, including cash.)

None.

MIDDLESEX, *ss:*

DECEMBER 15, A. D. 1903.

Then appeared the within named Frank B. Cotton and made oath that the within account is just and true.

Before me,

WALTER B. GRANT,
Justice of the Peace.

(Endorsed on back:) 52109. George N. Fletcher Administrator's first and final account. Filed Dec. 16, 1903. Returnable Jan. 5, 1904. Allowed Jan. 7, 1904. Rec. Book —, Page —. For Accountant:—Walter B. Grant, Attorney at Law, 15 Court Square, Boston. For Respondent: —— ——.

EXHIBIT 4.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Registry of Probate.

I, Elijah George, Register of the Probate Court for said County of Suffolk, having by law the custody of the seal and all the records, books, documents, and papers of or appertaining to said Court, hereby

certify the papers hereto annexed to be true copies of papers
273 appertaining to said Court, and on file and of record in the office of said Court, to-wit:—the petition, decree, bond and letter relating to the appointment of Albert W. Brown as administrator of the estate not already administered of William White, late of Boston, in said County, deceased.

In witness whereof, I have hereunto set my hand and the seal of said Court, this twenty-fourth day of September, in the year of our Lord one thousand nine hundred and three.

[SEAL.] ELIJAH GEORGE, *Register.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Probate Court.

I, John W. McKim, Esquire, Judge of the Probate Court within and for the County of Suffolk, hereby certify that Elijah George, esquire, whose signature is affixed to the annexed certificates and attestation, is the Register and proper certifying officer of said Court, and has, by law, the custody of the seal, and all the Records, books, documents and papers of, or appertaining to said Court, and that said certificates and attestation are in due form and entitled to full faith and credit.

In witness whereof, I have hereunto set my hand, this twenty-fourth day of September, in the year of our Lord one thousand nine hundred and three.

[SEAL.] JOHN W. McKIM,
Judge of Probate Court.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Registery of Probate.

I, Elijah George, Esquire, Register of the Probate Court within and for the County of Suffolk, hereby certify that John W.
274 McKim, Esquire, whose signature is affixed to the annexed certificate, is the First Judge of said Court, duly commissioned and qualified, and that his said certificate is in due form, and entitled to full faith and credit.

In witness whereof, I have hereunto set my hand, and affixed the seal of said Court, this twenty-fourth day of September, in the year of our Lord one thousand nine hundred and three.

[SEAL.] ELIJAH GEORGE, *Register.*

To the honorable the judge of the probate court in and for the county of Suffolk:

Respectfully represents Albert Wetherbee Brown, of Boston, in the County of Suffolk, that on the eighteenth day of August, A. D. 1892, Frances M. Brown was appointed by this Court, administratrix of the estate not already administered of William White,

late of said Boston, deceased, intestate, succeeding Rufus H. Spalding, a prior deceased administrator; that the said Frances M. Brown has deceased without having fully administered said estate, and that there are goods and estate of the said William White to the amount of twenty dollars remaining to be administered; that your petitioner is the executor of the will of said Frances M. Brown and sole devisee thereunder and that said Frances M. Brown was daughter and sole heir of the said William White, and that Marion Estey Brown is the only child of said Frances M. Brown and her sole her at law and your petitioner is the husband of said Frances M. Brown.

275 Wherefore your petitioner prays that he be appointed administrator of the estate, not already administered, of said William White and certifies that the statements herein contained are true to the best of his knowledge and belief.

Dated this tenth day of December, A. D. 1900.

ALBERT WETHERBEE BROWN.

SUFFOLK, *ss:*

Subscribed and sworn to this 11th day of December, A. D. 1902, before me, Dudley A. Dorr, Justice of the Peace.

The undersigned, being all persons interested, hereby assent to the foregoing petition.

ALBERT WETHERBEE BROWN.
MARION ESTEY BROWN.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

At a Probate Court holden at Boston, in and for said County of Suffolk, on the twenty-sixth day of December, in the year of our Lord one thousand nine hundred and two.

The petition of Albert Wetherbee Brown, of Boston, in said County, praying that he *he* appointed administrator of the estate, not already administered, of William White, late of Boston, in said County of Suffolk, deceased, intestate, having been considered, and it appearing that there is personal estate of said deceased to the amount of twenty dollars remaining to be administered.

It is decreed that said petitioner be appointed administrator of said estate, not already administered, first giving bond, with sufficient sureties, for the due performance of said trust.

JOHN W. McKIM,
Judge of Probate Court.

276 Know all men by these presents, That we, Albert Wetherbee Brown, of Boston, in the County of Suffolk, as principal, and Fidelity and Deposit Company of Maryland, a corporation duly established by law and having an usual place of business in Boston, in the County of Suffolk and Commonwealth of Massachusetts, as surety, and all within the Commonwealth of Massachusetts, are holden and stand firmly bound and obliged unto

John W. McKim, Esquire, Judge of the Probate Court in and for the County of Suffolk, in the full and just sum of one thousand ($1,000.00) dollars, to be paid to said Judge and his successors in said office; to the true payment whereof we bind ourselves and each of us, our and each of our heirs, executors and administrators, successors and assigns jointly and severally by these presents. Sealed with our seals, and dated the twenty-sixth day of December, in the year of our Lord one thousand nine hundred and two.

The condition of this obligation is such, that if the above bounden, Albert Wetherbee Brown, administrator of the estate not already administered of William White, late of said Boston, deceased, intestate, shall:—

First, make and return to said Probate Court, within three months after his appointment, a true inventory of all the real and personal estate of said deceased which at the time of making of such inventory shall have come to the possession or knowledge of said administrator;

Second, administer according to law all the personal estate of said deceased which may come to the possession of said administrator, or of any person for him, and also the proceeds of any of the real estate of said deceased that may be sold or mortgaged by said administrator;

277 Third, render upon oath, a true account of his administration at least once a year, until his trust is fulfilled, unless he is excused therefrom in any year by said Court, and also render such account at such other times as said Court may order;

Fourth, pay to such persons as said Court may direct, any balance remaining in his hands, upon the settlement of his accounts; and

Fifth, deliver his letters of administration into said Court in case any will of said deceased is hereafter duly proved and allowed. Then this obligation to be void, otherwise to remain in full force and virtue.

ALBERT WETHERBEE BROWN. [SEAL.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
By ADDISON R. PIKE, *Resident Vice-President.*

Attest:—
THOS. L. O'BRION,
Resident Assistant Secretary.

SUFFOLK, *ss:*

DECEMBER 26, A. D. 1902.

Examined and approved.

JOHN W. McKIM,
Judge of Probate Court.

I, Albert Wetherbee Brown, the within named administrator, declare, that, to the best of my knowledge and belief, the estate and effects of the within named deceased do not exceed in value the following mentioned sums, viz.:

Real estate ..... $.....
Personal Estate ..... $ value unknown

(Sign.) ALBERT WETHERBEE BROWN.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Probate Court.

[SEAL.] To Albert Wetherbee Brown, of Boston, in the County of Suffolk, and Commonwealth aforesaid.

278 You are appointed administrator of the estate, not already administered, of William White, late of Boston, in said County of Suffolk, deceased, intestate.

You are required to make and return to said Probate Court, within three months from the date hereof, a true inventory of all the real and personal estate of said deceased which at the time of the making of such inventory shall have come to your possession or knowledge;

To administer according to law all the personal estate of said deceased which may come to your possession, or that of any person for you, and also the proceeds of any of the real estate of said deceased that may be sold or mortgaged by you;

To render upon oath a true account of your administration, at least once a year until your trust is fulfilled, unless excused therefrom, in any year, by said Court;

To pay any balance remaining in your hand upon the settlement of your accounts, to such persons as said Court shall direct;

To deliver these letters of administration into said court, in case any will of said deceased shall be hereafter duly proved and allowed;

And also, within three months, to cause notice of your appointment to be published once in each week for three successive weeks in the Boston Evening Transcript, a newspaper published in Boston, and return your affidavit of having given such notice, with a copy thereof, to the Probate Court.

Witness, John W. McKim, Judge of said Court, at Boston, this 26th day of December, in the year of our Lord one thousand nine hundred and two.

ELIJAH GEORGE, *Register.*

279 EXHIBIT 5.

31896.

Last Will and Testament of Frances M. Brown, Deceased.

I, Frances M. Brown, of Boston, in the County of Suffolk and Commonwealth of Massachusetts, do make this my last will and testament, hereby revoking any and all former wills by me made. I hereby constitute and appoint my husband, Albert Wetherbee Brown, to be sole executor of this my last will, and I direct that he may be exempt from giving any surety or sureties upon his official bond.

After the payment by my said executor of all my just debts and funeral charges out of my estate, I give, devise and bequeath all the rest, residue and remainder of the property of which I may be

approved and filed as required by law, I do by these presents commit unto you full power and authority to administer and faithfully dispose of according to law, all and singular the goods, chattels, rights, credits and estate of said deceased, which shall at any time come to your possession, or to the possession of any other person for you, and to ask, gather, levy, recover and receive all the goods, chattels, rights, credits and estate whatsoever of said deceased, which to him at the time of his death did belong, and to pay and discharge all debts and charges chargeable on the same, or such dividends thereon as shall be ordered and decreed by said Court; hereby requiring you to make and return to said court, within thirty days, a true and perfect inventory of all the goods, chattels, rights, credits and real estate of said deceased which shall come to your possession or knowledge, or to the possession of any other person for you, and also to render a just and true account of your administration to said court within one year, and at least once in each year thereafter during your administration, and at any other time when required by said
283 court, and to perform all orders and decrees of said court by you to be performed in the premises.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the City of Alpena, in said county, this 15th day of March, A. D. 1904.

[SEAL.] D. A. CAMPBELL,
Judge of Probate.

STATE OF MICHIGAN, *County of Alpena, ss:*

In the Probate Court for Said County.

I, D. A. Campbell, Judge of Probate for said County, do hereby certify that I have compared the foregoing copy of Letters of Administration General in the matter of the estate of William White, deceased, with the original Record thereof, now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of said Probate Court, at Alpena, this 12th day of April, A. D. 1904.

D. A. CAMPBELL,
Judge of Probate Court.

Exhibit 8.

No. 26 Eq.

SUFFOLK, *ss:*

Supreme Judicial Court.

——, —, 1903.

SPAULDING, Adm'r, Plff.
v.
FLETCHER, Dft.

In the above action I appear for plaintiff.

GEO. WM. ESTABROOK.

284 SUFFOLK, *ss:*

Supreme Judicial Court.

Filed Ap. 26, 1900.

Attest:
C. H. COOPER,
Ass't Clerk.

SUFFOLK, *ss:*

No. 26 Eq.

Supreme Judicial Court.

Filed June 9, 1900.

Attest:

C. H. COOPER,
Ass't Clerk.

SUFFOLK, *ss:*

Supreme Judicial Court.

JUNE 9, 1900.

SPAULDING, Adm'r, Plff.
v.
FLETCHER ET AL., Dft.

In the above action I appear for Frank B. Cotton, Adm'r *c. t. a.*
W. B. GRANT,
15 *Court Square, Boston.*

SUFFOLK, *ss:*

No. 26 Eq.

Supreme Judicial Court.

Filed Dec. 30, 1902.

Attest:

C. H. COOPER,
Ass't Clerk.

SUFFOLK, *ss:*

Supreme Judicial Court.

—— —, 1904.

SPAULDING, Adm'r, Plff.
v.
FLETCHER, Dft.

285 In the above action we appear for Albert W. Brown, Adm'r *de bonis.*

ALBERT W. BROWN, *Ex'or and*
ALBERT W. BROWN, *as Devisee.*

GEO. WM. ESTABROOK,
DUDLEY A. DORR,
By G. W. E.

SUFFOLK, *ss:*

No. 26 Eq.

Supreme Judicial Court.

Filed Jan. 2, 1903.

Attest:

C. H. COOPER,
Ass't Clerk.

SUFFOLK, *ss:*

Supreme Judicial Court.

—— —, 1904.

SPALDING, Adm'r, Pl'ff,
v.
FLETCHER, D'f't.

In the above action I appear for Albert W. Brown, adm'r *de bonis*,
ALBERT W. BROWN, *Ex'or., and*
ALBERT W. BROWN, *as Devisee.*

JOHN MINER,
Detriot, Mich.
By A. W. BROWN.

OCT. 12, 1904.
W.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

I, John Noble, Clerk of said Court, hereby certify that the copies of the appearances of Geo. W. Estabrook, W. B. Grant, of Geo. W. Estabrook and Dudley A. Dorr, and of John Miner, hereto attached are true copies of appearances filed in the suit of Rufus H. Spaulding, administrator, *vs.* Georeg N. Fletcher, No. 26 Equity, in said court and of the whole thereof, including the certificate of filing the same, and I further certify that it appears from the files and records of said cause that no other separate appearances have been filed therein since November 1, 1899.

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In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this 6th day of October, A. D. 1904.

[SEAL.] JOHN NOBLE, *Clerk.*

Exhibit 9.

Oct. 6, 1904.
W.

Commonwealth of Massachusetts, *Suffolk, ss:*

Supreme Judicial Court.

Docket Entries.

26	Rufus H. Spaulding, Adm'r, *vs.*	
D. A. Dorr (R. Lund) G. W. Estabrook	George N. Fletcher *et als.* 1900.	(J. Mason). (J. Lowell) for G. N. Fletcher
	Apr. 27. Motion for citation filed and allowed.	Richardson & Hale for J.
	" " Citation issued ret. 1st Mon. June.	Starrett & Starrett &
For entries see	July 14. Agreement as to copies of deeds filed.	Ritchie, Assns.
Docket 1899	" 17. Motion for special commissions filed and allowed.	F. N. Nay. withd App. May 1.
	" 18. Commissions issued accordingly.	W. B. Grant for Cotton Adm'r.
287		
	1901.	
D. A. Dorr	Mar. 15. Statement of account filed by pl'ff.	
G. W. Estabrook	May 20. Petition of F. M. Brown, Adm'x, to bring in heirs of Fletcher as parties deft filed.	Richardson &
For entries see	Aug. 26. Amended petition to bring in heirs of Fletcher filed.	Hale for J. Starrett
proceed. dockets	Sept. 23. Mem. of decision, as on file.	& Starrett & Ritchie, Assns.
	Oct. 2. Petition to summon in ex'ors &c. of deft Fletcher filed.	W. B. Grant for Cotton, Admr.
	" 4. Decree thereon, as on file.	
	" 10. Supplemental order, as on file.	

	1902.		
D. A. Dorr	Jan. 24.	Order of Court, as on file.	
G. W. Estabrook	Dec. 30.	Suggestion of death of F. M. Brown, Adm'x, &c. filed	
G. W. Estabrook & D. A. Dorr for A. W. Brown, Admr. &c.		and motions of A. W. Brown, as Adm'r &c (3) to be admitted as party, filed & allowed	Richardson & Hale for J. Starrett & Starrett & Ritchie, Assns.
For entries see previous dockets.			W. B. Grant for Cotton, Admr.
	1903.		
D. A. Dorr.	Feb. 5.	Award of arbitrator filed.	
G. W. Estabrook for A. W. Brown, Admr.	" 10.	Award opened in court on motion & by order of court, no party objecting.	Richardson & Hale for J. Starrett & Starrett & Ritchie, Assns.
J. Miner (Detroit) for A. W. Brown, Adm'r &c.	Apr. 14.	*Final Decree*, as on file.	W. B. Grant for Cotton, Admr.

288 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

I, John Noble, Clerk of said Court, hereby certify that the copy of docket entries hereto attached is a true copy of all the docket entries made since November 1, 1899, in the suit of Rufus H. Spaulding, administrator, against George N. Fletcher, No. 26 Equity, in this court, and of the whole thereof, and I further certify that it appears from the files and records of said cause that no papers or documents of any kind have been filed in said cause or orders made or other proceedings had therein since November 1, 1899, excepting as shown by said docket entries and excepting the proofs of service of three certain citations which proofs of service are, according to the practice of said court, not noted upon the docket, to wit, proof of service of citation on Frank W. Fletcher individually and as executor in Alpena, Michigan, October 12, 1901; proof of service of citation against Allan M. Fletcher individually and as executor in said Alpena, October 15, 1901, proof of service of citation against Grace Fletcher in Detroit, Michigan, October 23, 1901.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 6th day of October, A. D. 1904.

[SEAL.] JOHN NOBLE, *Clerk.*

EXHIBIT 10.

STATE OF MICHIGAN, *County of Wayne, ss:*

Probate Court for said County.

In the Matter of the Estate of GEORGE N. FLETCHER, Deceased.

289 By Edgar O. Durfee, Judge of Probate for said County.

To Frank W. Fletcher and Allan M. Fletcher, Greeting:—

Whereas, George N. Fletcher lately departed this life testate, being at the time of his death an inhabitant of said County of Wayne, and having at the time of his death, estate within said County of Wayne to be administered; whereby the power of granting probate of the will and administration and full disposition of the estate of said deceased in the State of Michigan, and also the hearing, examining and allowing the account of such administration doth appertain unto me;

And whereas, at a session of said Probate Court, holden in the City of Detroit, in said County, on the fifth day of December in the year of our Lord one thousand eight hundred and ninety-nine the last will and testament of said deceased (a copy whereof is hereunto annexed), was duly proved and allowed, wherein you are appointed executors thereof and you having given a bond in the premises which has been duly approved and filed as required by law in that behalf.

Now, therefore, I do, by these presents, commit unto you, the said Frank W. Fletcher and Allan M. Fletcher full power and authority to administer and faithfully dispose of, according to law and the will of the said testator, all and singular the goods, chattels, rights, credits and estate of said deceased within the State of Michigan, which shall at any time come to your possession, or to the possession of any other person for you, and to ask, gather, levy, recover and receive all the goods, chattels, rights, credits and estate whatsoever of said deceased, which to him while he lived and at the time of his death did belong; and to pay and discharge all debts, legacies and charges chargeable on the same, or such dividends thereon as shall be ordered

290 and decreed by said Court; hereby requiring you to make and return to said Court, within thirty days, a true and perfect inventory of all the goods, chattels, rights, credits and real estate of said deceased which shall come to your possession or knowledge, or to the possession of any other person for you, and also to render a just and true account of your administration to said court within one year, and at least once in each year thereafter during your administration, and at any other time when required by said court, and to perform all orders and decrees of said court by you to be performed in the premises.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Probate Court, at Detroit, the [SEAL.] twelfth day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

EDGAR O. DURFEE,
Judge of Probate.

Recorded in Lib. 244, Fol. 21.

In the name of God, Amen.

I, George N. Fletcher, of the city of Detroit, State of Michigan, do make and publish this my last Will and Testament.

First. I direct my executors hereinafter named to pay all my just debts.

Second. I direct that my executors shall pay to my sister, Mary Ann L. Fletcher the sum of Twelve Hundred Dollars each and every year in quarterly payments during the term of her life.

Third. I direct that so long as Addison F. Fletcher shall have some position whereby he can and may be able to earn Twelve Hundred Dollars per year it shall be the business of my executors to look after and enable him to earn that amount but, when so unable to earn a fair living by sickness or other visitations of God, they
291 shall pay to him such sums as they may deem advisable each year of his life not to exceed that amount.

Fourth. I would wish and request my executors to pay to such of my relations such sums as they may deem best. Such persons as have from time to time received my bounty will be found on my books.

Sixth. I would give to my nieces, daughters of my deceased sister, Maria Adams, Sarah Stone, Maria Adams and Mary Adams, now of Boston, the sum of two thousand dollars each, if alive at the time of my death.

Seventh. The rest and residue of my estate, real and personal, I give and bequeath to my wife, Sarah A. G. Fletcher, and my children and the survivors of them and the lawful issue of any deceased child, such issue to take such share and part as its parent would take, share and share alike.

Eighth. I do hereby nominate and appoint my wife, Sarah A. G. Fletcher, and my sons, Frank W. Fletcher and Allan M. Fletcher and the survivors of them, the executor and executors of this my last will, and do give them full power and authority to sell and contract to sell any and all of my real and personal estate on such terms and conditions as they shall deem proper, and execute all necessary conveyances therefor and to perform all contracts for sale of lands by me and give deeds therefor and to do and perform all acts in relation to my estate which I might do if living; and I do not require of them any bond or security for the performance of their duties.

In witness whereof I have hereunto set my hand and seal this sixth day of December, A. D. 1884.

GEORGE N. FLETCHER.

Signed, sealed and delivered by the said George N. Fletcher,
292 the testator, as and for his last will and in the presence of us, who, in his presence and in the presence of each other, and at his request, have hereunto — our names as witnesses.

SAMUEL McCASKRY STANTON.
EDWARD PAYSEN SHELDON.

(Admitted to Probate Dec. 5, 1899.)

Assignments of Error.

Now comes the claimant and says that in the record and proceedings in this cause there is manifest error in the following particulars, to-wit:

The Circuit Court erred:

1. In overruling motion made by claimant to direct the jury to render a verdict in his favor.

2. In directing the jury to render a verdict in favor of the defendant estate.

3. In instructing the jury in the general charge in the language contained in the paragraph lettered "F."

4. In instructing the jury in the general charge in the language contained in the paragraph lettered "I."

5. In instructing the jury in the general charge in the language contained in the paragraph lettered "J."

6. In instructing the jury in the general charge in the language contained in the paragraph lettered "K."

293 7. In instructing the jury in the general charge in the language contained in the paragraph lettered "L."

8. In instructing the jury in the general charge in the language contained in the paragraph lettered "M."

9. In instructing the jury in the general charge in the language contained in the paragraph lettered "N."

10. In failing to give full faith and credit to the records and judicial proceedings in the case of Rufus Spalding, administrator of the estate of William White, deceased, plaintiff, *vs.* George N. Fletcher, James Campbell and Eliza White, defendants, in the Supreme Judicial Court in equity for the County of Suffolk, State of Massachusetts, in accordance with Article 4, Section 1, of the Constitution of the United States.

11. In failing to give to the records and judicial proceedings in the case of Rufus Spalding, administrator of the estate of William White, deceased, plaintiff, *vs.* George N. Fletcher, James Campbell and Eliza White, defendants, in the Supreme Judicial Court in equity for the County of Suffolk, State of Massachusetts, such faith and credit as they have by law or usage in the courts of the State of Massachusetts, in accordance with Section 905 of the Revised Statutes of the United States.

12. In overruling the motion made by claimant to set aside the verdict and judgment and order a new trial for the first reason assigned by claimant why said motion should be granted.

13. In overruling the motion made by the claimant to set aside the verdict and judgment and order a new trial for the second reason assigned by the claimant why said motion should be granted.

294 Wherefore, the claimant prays that the judgment entered on the verdict rendered in this cause may be set aside and reversed.

JOHN MINER,
Attorney for Claimant.

GREER, WILLIAMS, MARTIN & BUTLER,
Of Counsel.

And because the said several matters do not appear of record in said cause, I, the said Circuit Judge, at the request of counsel for the claimant, have on this 3rd day of November, 1905, settled and signed this bill of exceptions, hereby certifying that the same contains all the evidence and proceedings upon the said trial; and that the foregoing assignments of error were annexed to the said bill at the time of the settlement thereof.

FLAVIUS L. BROOKE,
Circuit Judge.

295 November 4th, 1905 a Writ of Error was sued out by the claimant, Albert W. Brown, and subsequently the following proceedings were had in the Supreme Court:

296 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lan-sing, on the second day of March in the year of our Lord one thousand nine hundred and six.

Present, the Honorable William L. Carpenter, Chief Justice, Aaron V. McAlvay, Claudius B. Grant, Charles A. Blair, Robert M. Montgomery, Russell C. Ostrander, Frank A. Hooker, Joseph B. Moore, Associate Justices.

No. 21408.

ALBERT W. BROWN, Claimant,
vs.
The Estate of GEORGE N. FLETCHER, Deceased, Defendant.

This cause coming on to be heard is argued by Messrs. Miner and Geer for claimant and by Mr. Campbell for defendant, and submitted.

297 Supreme Court.

ALBERT W. BROWN, Claimant and Appellant,
v.
Estate of GEORGE N. FLETCHER, Deceased, Defendant and Appellee.

Opinion.

Before Carpenter, C. J., McAlvay, Blair, Ostrander, Moore, JJ.

George N. Fletcher, a citizen of Michigan, domiciled at Detroit, Michigan, died at Detroit, November 5, 1899. By his last will, dated December 6, 1884, he nominated his wife and his two sons and the survivors of them his executors. The will disposes of his entire estate, was admitted to probate in Wayne county, Michigan, December 5, 1899, and the sons were appointed to administer the property. In due course of such administration, a claim against the estate was presented to the commissioners on claims, was by them disallowed, and, upon appeal to the circuit court for the county of Wayne, the case coming on to be heard before the court and a jury,

the claimant to maintain the issue on his part introduced in evidence:

1. The claim presented before the commissioners on claims, hereinafter set out.

2. A duly certified copy of the record of the cause of Rufus H. Spalding, administrator of the estate of William White, deceased, complainant, *v.* George N. Fletcher, James Campbell and Eliza White, defendants, in the supreme judicial court of the commonwealth of Massachusetts.

3. A duly certified copy of the proceedings of the probate court of Middlesex county, Massachusetts, in the matter of the estate of George N. Fletcher in that state consisting of the petition for
298 the appointment of an administrator with the will annexed, the notice, the appointment of an administrator with the will annexed, the bond of the administrator, the inventory of the estate, petition for leave to sell real estate, order allowing the sale of real estate and final account of the administrator with the will annexed.

4. A duly certified copy of the appointment by the probate court of Suffolk county, Massachusetts, on December 26, 1902, of Albert W. Brown, as administrator *de bonis non* of the estate of William White, deceased.

5. A duly certified copy of the appointment by the probate court of Wayne county, on November 2, 1903, of Albert W. Brown, as executor of the last will and testament of Frances M. Brown, deceased, including a copy of the will of Frances M. Brown.

6. A duly certified copy of the appointment by the probate court of Alpena county, Michigan, on March 15, 1904, of Albert W. Brown, as administrator *de bonis non* of the estate of William White, deceased.

7. The revised laws of Massachusetts of the issue of 1902.

8. The will of George N. Fletcher, which was probated in Wayne county, and the letters testamentary issued by said court on December 5, 1899, to Frank W. Fletcher and Allan M. Fletcher, as executors thereof; also the inventory of the estate filed in said court on December 7, 1900, showing total assets amounting to $575,809.02.

Claimant, sworn as a witness in his own behalf, testified that there were no debts against the estates of William White or of Frances M. Brown in Michigan nor in Massachusetts; that he was ad-
299 ministrator *de bonis non* of the estate of White and executor of the last will of Frances M. Brown.

To maintain and prove the issue on its part, the estate of George N. Fletcher introduced the following evidence:

1. Against the objection and exception of the claimant that the record speaks for itself and that the clerk can only certify as to what is in the record, a certificate of the clerk of the supreme judicial court of Massachusetts, showing that there were no appearances in that court on behalf of the defendant estate after the death of George N. Fletcher on November 5, 1899, except the appearance of the administrator with the will annexed.

2. Against the objection and exception of the claimant on the same ground, a certificate showing the docket entries in the cause after the death of George N. Fletcher.

All of the testimony and evidence so offered was received, and thereupon counsel for the claimant moved the court to direct the jury to render a verdict in his favor for the amount due him under the decree offered in evidence, which motion the court then and there overruled, and counsel for the claimant excepted to the action of the court in so doing. Counsel for the defendant estate moved the court to direct the jury to render a verdict in favor of said estate, disallowing the claim of the claimant, which motion was granted. Counsel for the claimant duly excepted to the action of the court in granting the motion of counsel for defendant estate. The jury, under the instructions of the court, rendered a verdict in favor of the defendant estate. Afterwards, and on September 9, 1905, judgment was entered on the verdict. A motion for a new trial having been made, it was denied. The grounds of the motion were that the court had, in directing a verdict and in entering judgment for the defendant estate, failed to give full faith and
300 credit to the records and judicial proceedings of the supreme judicial court, in equity, for the county of Suffolk, Massachusetts, in accordance with (1) article 4, section 1, of the constitution of the United States; (2) with section 905 of the revised statutes of the United States. Claimant has brought the record of the proceedings into this court by writ of error, assigning as error the refusal of the court to direct a verdict for claimant, the directed verdict, failure of the court to give full faith and credit to the records of judicial proceedings of the Massachusetts court, and the denial of the motion to set aside the verdict and judgment and grant a new trial.

The claim which is in question is formally stated as follows:

"To Frederick W. Whiting and Charles A. Rathbone, Commissioners on Claims in said matter:

GENTLEMEN: You are hereby notified that Albert W. Brown is a creditor of said estate in the sum of four hundred and four thousand two hundred and fifty-four dollars and twelve cents ($404,254.12), and interest thereon at the rate of six (6) per cent. per annum, from the fourteenth day of April, 1903.

Said claim is based upon the final decree of the Supreme Judicial Court for the Commonwealth of Massachusetts entered on the fourteenth day of April, 1903, and which decree was entered in a suit in said court to which the said George N. Fletcher, deceased, in his lifetime, was a party defendant, and which decree purports to and does bind the estate of the said decedent to the payment of the full amount decreed to be paid, as aforesaid, under its provisions.

A Copy of the said decree and the proceedings in said suit, duly certified and attested under the act of Congress and the law of this state, is ready to be produced and proved before you as the commissioners on claims in said estate, and the said claimant, Albert W. Brown, does and will claim for the said decree when produced and proven according to law, the same full force, faith and credit to which the same is entitled under the laws of the said Commonwealth

of Massachusetts, within the State of Michigan, against the estate of said George N. Fletcher, deceased.

The said Albert W. Brown therefore demands and claims against the estate of the said George N. Fletcher, deceased, the full sum of $404,254.12, with interest thereon at the rate of six (6) per cent. per annum from the 14th day of April, 1903.

301 You are also notified, that the said claimant is now ready to present and prove his said claim without delay, and you are respectfully requested to fix an early date for the hearing thereof in accordance with the statute in such case made and provided.

Dated, April 6th, 1904.

ALBERT W. BROWN,
By JOHN MINER,
His Attorney."

The documentary evidence of the claimant consists of the record and files in a certain judicial proceeding which eventuated in a decree of the supreme judicial court, in equity, for the county of Suffolk, Massachusetts, confirming, in favor of the claimant and appellant, certain awards of an arbitrator or referee and concluding as follows:

"And it is further ordered, adjudged and decreed that Frank B. Cotton, as he is the administrator with the will annexed *de bonis non* of the estate of the said George N. Fletcher, deceased, be, and he is hereby ordered and directed to pay to Albert W. Brown, the now plaintiff in this suit in accordance with said final award the full sum of three hundred and ninety-four thousand three hundred and seventy-two dollars and eighty-seven cents ($394,372 87/100) awarded to be paid by the final award of the said William L. Putnam, with interest thereon from the fifth day of February, in the year nineteen hundred and three, the date of the filing of said final award, at the rate of six per cent. per annum, amounting at the date of entry of this decree to the sum of four thousand and four hundred and ninety-five dollars and eighty-five cents (4,495 85/100); together with the costs of this suit to be taxed herein, with interest upon the whole sum thereof at the rate of six per cent. per annum from the date of the entry of this decree.

And it is further ordered, adjudged and decreed, for the purpose of enabling the plaintiff to enforce the covenants of said submission, that the executors of the last will and testament of the said George N. Fletcher are bound to abide by and perform the final award of the said William L. Putnam, and are liable to pay unto the said Albert W. Brown, the now plaintiff in this suit, in accordance with said final award, the full sum of three hundred and ninety-four thousand three hundred and seventy-two dollars and eighty-seven cents ($394,372 87/100) awarded to be paid by the final award of the said William L. Putnam, with interest thereon from the fifth day of February, in the year nineteen hundred and three, the date of the filing of said award, at the rate of six per cent. per annum, amounting at the date of the entry of this decree to the sum of four thousand four hundred and ninety-five dollars and eighty-five cents ($4,495 85/100), together with the costs of this suit to be taxed herein, with

interest upon the whole sum thereof at the rate of six per cent. per annum from the date of the entry of this decree.

And it is further ordered, adjudged and decreed, for the purpose of enabling the plaintiff to enforce the covenants of said submission, that the said Frank W. Fletcher, Allan M. Fletcher and Grace
302 Fletcher as the legal representatives of the said George N. Fletcher, deceased, are bound to abide by and perform the final award of the said William L. Putnam, and are liable to pay unto the said Albert W. Brown, the now plaintiff, such part of the full sum of three hundred and ninety-four thousand three hundred and seventy-two dollars and eighty-seven cents ($394,372 87/100), awarded to be paid by the final award of the said William L. Putnam, with interest thereon from the fifth day of February in the year nineteen hundred and three, the date of the filing of said final award, at the rate of six per cent. per annum, amounting at the date of the entry of this decree to the sum of four thousand and four hundred and ninety-five dollars and eighty-five cents ($4,495 85/100), together with the costs of this suit to be taxed herein, with interest upon the whole sum thereof at the rate of six per cent. per annum from the date of the entry of this decree, as may be unsatisfied after applying such part of the estate of the said George N. Fletcher, deceased, as may remain undistributed in the hands of the said administrator or executors of his said last will and testament.

And the Court doth further order, adjudge and decree that the plaintiff in this suit do recover all of his costs in this suit to be taxed by the clerk in accordance with the rules and practice of this court.

And it is further ordered, adjudged and decreed that the bill of complaint in this cause and all proceedings thereunder be and the same is hereby dismissed as to the defendants, James Campbell and Eliza White."

The suit in which this decree was made was begun in April, 1874. Process was personally served within the jurisdiction of the court upon each defendant, and each appeared and filed an answer. There was a reference to a master to take testimony and report the facts and state accounts. He filed a report in which he set forth the facts found by him, but he did not state the account between the parties. The matter was again committed to the master to determine certain stated issues, and he again made a report. It was April 15, 1891, when this point in the proceedings was reached. In April, 1892, the exceptions to the report not having been brought on for argument, an agreement was made and was reduced to writing, which is here set out.

"Said Complainant, Rufus H. Spalding, and said defendant, George N. Fletcher, and Frances M. Brown, who has been made a party to said suit, agree to submit to the arbitration of Hon. William C. Endicott, of Salem, Massachusetts, all the claims and demands set forth in said suit, and all other claims and demands which either party may have against the other; and especially all claims and demands which said Spalding as administrator may have, or
303 which the estate of his intestate may have, against said Fletcher, and all claims which the said Fletcher may have

against said Spalding as administrator, or against said estate, whether represented by said Spalding or by any successor in the administration of said estate, and all claims which the said Frances M. Brown may have against said Fletcher, or that said Fletcher may have against said Frances M. Brown.

And the said George N. Fletcher and the said Frances M. Brown, each respectively, covenant, promise and agree, to and with, each other, for themselves and their respective heirs, executors and administrators that they will abide by and faithfully perform and fulfill all the terms and conditions of any award which may be made by said arbitrator, or by any substitute or successor as hereinafter provided; and said George N. Fletcher, for himself and his heirs, executors and administrators, and said Rufus H. Spalding for himself and for the estate which he represents, covenants, promises and agrees, each to and with the other as follows:

The said Fletcher covenants, promises, and agrees that he will and his heirs, executors and administrators shall faithfully fulfil and perform all the terms and conditions of any award which may be made by said arbitrator, or his substitute or successor as aforesaid, for the doing of any act or the payment of any sum of money which said arbitrator may award that he shall do or pay to said Spalding, as administrator of the estate of said White, and that he will and his heirs, executors and administrators shall likewise perform and pay any such award to any successor of said Spalding in the administration of said estate, and said Spalding covenants, for himself and his successors, not personally but as an obligation of the estate, that said estate shall perform and fulfil any award and pay any sum which said arbitrator shall award to be paid by said estate to said Fletcher; and said Frances M. Brown covenants, promises and agrees to and with said Fletcher that if said Spalding shall decease, or be removed from the administration of said estate, his successor shall well and truly abide by and perform all the terms and conditions of any award made by said arbitrator, or his substitute or successor as aforesaid, which are to be performed and fulfilled by said estate or by its administrator to said Fletcher; it being the intention of this submission to forever settle all controversies between all said parties, and that the decease of any party shall not revoke said submission, but that said arbitration shall continue, and that the successors of said Spalding, and the legal representatives of said Brown and said Fletcher, shall be bound by the final award therein.

And it is further agreed by the said parties that if said arbitrator shall decease, or shall become incapacitated to act as arbitrator, then in that case the parties shall agree upon an arbitrator who shall take his place, with all the power and authority herein submitted to the arbitrator herein named, and if the parties shall fail to agree to make such appointment within thirty days from the decease or incapacity of said arbitrator, either party may apply to any Judge of the Supreme Court to appoint an arbitrator in the place of the arbitrator hereby appointed, who shall have all the powers and authority vested in the arbitrator herein named.

And it is further agreed that all the evidence hereinbefore taken in said cause, either under the commissions appointed by the court, or before the Master appointed in said cause, and the reports
304 of said Master, shall be submitted to said arbitrator, but the reports shall not have the same force and effect as the same would have had and received in a hearing before said Court, but they shall have only such force and effect, if any, as the Arbitrator may see fit to give them, it being agreed that a judgment of the arbitrator shall be final upon all the questions of law and fact, except as hereinafter provided, and that any of said evidence which may be regarded by said arbitrator as inadmissible or incompetent, may be rejected by him.

And it is agreed that in the hearing of the questions submitted to the arbitrator he shall first pass upon the general question of liability or non-liability and announce his decision without taking any additional evidence; and in case he shall decide that a liability exists the parties shall have a reasonable time to produce evidence and determine the amount of said liability. And when the final award shall be made by said arbitrator, either party may apply to said court for a decree to enforce the same, or the same may be enforced by a decree or judgment in any other court, having jurisdiction of the parties. And the prevailing party shall be entitled to have a decree or judgment entered in any court having jurisdiction over the party against whom such award may be made, in conformity with the award so made, as a judgment entered by consent which is hereby given.

Upon the final report of the arbitrator any questions of law except those arising upon the admissibility and weight of the evidence shall be reserved for the decision of the Court, upon the request of either party, and in this connection the statutes and decisions of Michigan shall be admissible without other proof than the recognized books of statutes and reports and any question arising thereon shall be treated as a question of law and not of fact.

The submission is to be made under a rule of this Court and not to operate as a discontinuance of said suit.

In Witness Whereof the parties hereto have set their hands and seals, this Fourth day of April, 1892.

(S'g'd)	GEO. N. FLETCHER.	[SEAL.]
"	FRANCES M. BROWN.	[SEAL.]
"	RUFUS H. SPALDING,	[SEAL.]
	"Administrator."	

The Hon. William L. Putnam, then and now judge of the circuit court of the United States for the first circuit, was finally selected by the parties as arbitrator and was, by a consent order, appointed by the court. In April, 1894, he filed a preliminary award, in which he adjudged that defendant Fletcher was liable as trustee to the other parties to the reference and directed and awarded an accounting, as such trustee, by Fletcher. Thereafter, he proceeded to determine the amount due to Frances M. Brown as administratrix and as heir of White. Defendant Fletcher appeared before the arbitra-

tor personally and by attorney, but died before the accounting was completed and the second and final award made. His death
305 was suggested of record, and in accordance with the laws of the state of Massachusetts, decedent having some estate in that jurisdiction, the suit was revived against Frank B. Cotton, who had been appointed by the local authority, upon the petition of complainant, administrator with the will annexed of his (Fletcher's) Massachusetts' estate. The Michigan executors of the will of Fletcher were requested to come in and defend the suit. Upon their refusal so to do, the complainant filed a petition in the Massachusetts court setting up the proceedings had in that court, the stipulation or agreement for arbitration, the death of Fletcher and the probate of his will in Michigan, the names of his heirs and his executors; that the estate in Massachusetts was not valued at more than one thousand dollars and that

"Your petitioner further represents, that the said executors, although requested so to do, failed to come into or to be represented in this cause, but declined and refused to further regard the proceedings therein as having any binding effect upon them or the estate which they held as such executors in Michigan or elsewhere outside of this commonwealth, and your petitioner shows, that the counsel who appeared for and represented the defendant George N. Fletcher in his life time in this suit, caused his appearance as such counsel to be withdrawn, on, to wit, the 1st day of May, 1900. * * *

Your petitioner is advised and therefore submits, that, in order that this court may regularly make and enter a valid decree in this cause, which will be personally binding and conclusive upon the said heirs at law of the said defendant, George N. Fletcher, it is necessary that the said Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher personally be made parties defendant to this suit. * * * Your petitioner therefore prays, that an order or decree of this court may be entered in said cause, specifying and declaring as follows: First. That Frank W. Fletcher and Allan M. Fletcher the executors of the last will and testament of the deceased George N. Fletcher as aforesaid, and the said Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, the children and legal representatives of the said deceased, George N. Fletcher, may be summoned in to defend this suit, in order that the cause may proceed to a final decree as contemplated by the covenant of submission of the parties to said cause, hereinbefore referred to. Second. That all necessary amendments to the pleadings in this cause may be made by either party, pursuant to the stipulation of the parties to that effect already on file in this cause. Third. That the court may make such other and further or different orders and decrees in the premises as shall be agreeable to equity and the rights of the parties respectively."

306 Upon this petition, the court made the following order:

"On the Petition of Frances M. Brown now Plaintiff in said cause for the summoning of additional parties to defend this suit filed October second, 1901.

It appearing to the court that upon an agreement of submission

and reference between the defendant George N. Fletcher during his life and the plaintiff, dated April 4, 1892, and by a rule of this court, dated October 18, 1893, this cause was referred to the determination of William L. Putnam, and

It further appearing that during the lifetime of the said George N. Fletcher a report was made by said referee to this court that the plaintiff was entitled to an account, and thereupon hearings were had as to the amount due upon such accounting, and while said hearings were in process the said defendant George N. Fletcher died, and that said George N. Fletcher was resident of Michigan and left three children, Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher and the last will and testament in which said Frank W. Fletcher and Allan M. Fletcher were named as executors has been probated in said Michigan, said executors have been duly qualified and that by said will and testament the said three children are residuary legatees and devisees of the said defendant George N. Fletcher, and

It further appearing that in the said agreement of submission and reference the said George N. Fletcher covenanted for his heirs and representatives that he would and his heirs, executors and administrators should faithfully fulfill and perform all the terms, & conditions of any award which may be made by said arbitrator or his substitute or successors, and it was covenanted by all the parties to said agreement of submission and refetence that said agreement of submission and reference should forever settle all controversies between all of said parties and that the decease of any party should not revoke said agreement of submission but that said arbitration should continue and the successors of said Spalding and the legal representatives of said Brown and said Fletcher should be bound by the final award therein, and

It further appearing by said agreement of submission and reference that when the final award should be made by said arbitrator either party might apply to the court for a decree to enforce the same, and the same might be enforced by a decree or judgment in any other court having jurisdiction of the parties, and that the prevailing party should be entitled to have a decree or judgment entered in the court having jurisdiction over the parties against whom such award might be made in conformity with the award so made as a judgment entered by consent which was thereby given, and

It further appearing that by the terms of the rule referring the said cause to the said William L. Putnam, it was provided that if either party neglected to appear on due notice then the reference to proceed *ex parte*, and

It also appearing to the court that the counsel of record who represented said George N. Fletcher during his lifetime had withdrawn their appearance and no appearance had been since entered, for his children or legal representatives except that an administrator with the will annexed had been appointed in the State of Massachusetts who has appeared and who has not objected to the granting of this petition, and

307 It further appearing in order that the hearings before said arbitrator may properly proceed and final decree be entered in this cause as contemplated by said agreement of submission and reference that the said children of the said George N. Fletcher and his executors should be summoned in to defend this suit,

It is ordered that the said Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, children of the said George N. Fletcher and the said Frank W. Fletcher and Allan M. Fletcher, executors of the last will and testament of the said deceased George N. Fletcher, have until one month from the first Monday of October current, being the rule day next succeeding the date of this order to appear in said cause, and upon default of appearance by that date that this cause proceed before the arbitrator *ex parte* as to such parties,"

and copies were duly served upon the heirs and executors in Michigan. They did not appear, their default was entered, and the accounting proceeded. The arbitrator filed his final award February 5, 1903. The estate of Mr. Fletcher, in Massachusetts, was found to be exhausted and wholly insolvent, nothing being realized therefrom in reduction of the amount of the decree.

The validity of those provisions of the decree which in terms affect the heirs of the decedent Fletcher with respect to a possible deficiency of the assets in the control of the executors, is not asserted.

OSTRANDER, *J.* (After making the foregoing statement of the case):

The question presented is whether the records and judgment put in evidence by the claimant establish his demand upon the defendant estate, and is answered by determining the effect which shall be given here to the proceedings and the decree of the Massachusetts court.

"By the constitution of the United States it is declared that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And congress, in pursuance of the power given them by the constitution in a succeeding clause, have declared that the judgments of state courts shall have the same faith and credit in other states as they have in the 308 state where they are rendered. They are therefore put upon the same footing as domestic judgments. But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was rendered to pronounce the judgment, nor an inquiry into the right of the state to exercise authority over the parties or the subject-matter, nor an inquiry whether the judgment is founded in and impeachable for a manifest fraud. The constitution did not mean to confer any new power upon the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other states. And they enjoy not the right of priority, or privilege, or lien which they have in the state

where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments." Story, Conflict of Laws, sec. 609.

Counsel for appellant, as we understand the briefs, make certain concessions with respect to propositions advanced and discussed at length in the briefs for the appellees, the effect of which concessions is to relieve this court from discussion and application of those propositions. It is to be added that, whether intended as concessions or as statements *arguendo* of concessions which might be safely made, an examination of them and of the authorities discloses no reason for disagreeing with any of them. Thus, for the purposes of this opinion, it is assumed—1. That the powers of an executor or administrator do not extend beyond the territorial jurisdiction in which he may have qualified. 2. That such executor or administrator cannot sue or be sued in his representative capacity in any other state than that in which he may qualify. 3. That a pending suit may not be revived against a foreign executor who has failed to qualify in the jurisdiction in which the suit is pending. 4. That as between representatives of a decedent estate appointed in different states, no privity is (in general) recognized in law as existing. 5. That no state has authority to invade the jurisdiction of another, and, by service of its process, compel parties resident there to submit their controversies to the determination of its courts. 6. That
309 parties cannot confer jurisdiction over a subject-matter by their consent upon courts from which the law has withheld it.

Counsel for both parties are agreed that the Massachusetts court acquired jurisdiction of the subject-matter and of the original parties to the suit; that after the death of Mr. Fletcher the suit was properly revived and properly proceeded to a final decree which had some force and effect.

It is also agreed that the submission of issues to arbitration was a step merely in the proceedings depending in court; that the decree, and not the award, constituted the final adjudication. This is in accord with the settled law of the state of Massachusetts. Woodbury *v.* Proctor, 9 Gray, 19; Seavey *v.* Beckler, 132 Mass. 203; Haskell *v.* Whitney, 12 Mass., 49; Willey *v.* Durgin, 118 Mass., 64.

In behalf of appellant, the grounds relied upon are, somewhat broadly, stated in the briefs in the following words:

"The appellant rests his contention in support of the decree in this case upon the plenary jurisdiction possessed by the Supreme Judicial Court, in equity, over both the subject matter of the suit and the person of the defendant, George N. Fletcher, prior to the death of said Fletcher, and which jurisdiction was not lost by reason of his death, but remained fully vested in that court for the purposes of entering the final decree in the cause, notwithstanding the death of said Fletcher. That the jurisdiction over the cause and the parties remained in the Massachusetts court, notwithstanding the death of the defendant, George N. Fletcher, because of the stipulation of the parties entered in the cause, and the inherent power of the court. That the jurisdiction attached to the executors of the deceased,

Fletcher, as his personal representatives, and that the service upon them at any place either within or without the territorial jurisdiction of the Massachusetts court of notice of a step in the proceedings in the cause was within the lawful power of that court to order for the purpose of making its jurisdiction effective and final."

"It is our contention that, even if counsel for the defendant estate are right in their claim that the court had no power to revive the suit against the executors in Michigan, and that the service of the notice upon them in Michigan did not give the court jurisdiction to make a valid decree against them, still the suit having been commenced in the lifetime of Fletcher, and process having been served upon him within the jurisdiction of the court, and he having appeared
310 in the cause and litigated the matters involved as above set forth; in other words, that the court having acquired jurisdiction of the subject matter and of the parties in the lifetime of Fletcher, it had the power to revive the suit against the administrator with the will annexed and make a decree that would be valid as a claim against his estate in Michigan. * * * If the decree is valid against the estate in Massachusetts,—and we shall show that it is,—then it is our contention that under Article 4, Section 1, of the Constitution of the United States, and Section 905 of the Revised Statutes of the United States, the decree is valid as a claim against the estate of Fletcher in Michigan."

Two principal propositions are asserted. One, that the lawful course and practice of the Massachusetts court and the relation of the administrator with the will annexed to the court, (as a party to the suit properly brought on the record), and to the estate of the decedent, (by reason of his privity with the domiciliary executors and the estate), have the effect to make the judgment pronounced by that court conclusive and binding upon the estate of Mr. Fletcher wherever found and upon the domiciliary representatives. The other position is that the Massachusetts tribunal acquired, by virtue of the stipulation of the parties, jurisdiction to pronounce, after the death of Mr. Fletcher, a judgment giving effect to the provisions of the stipulation; at least, the court had jurisdiction to declare what the force and effect of the stipulation should be and, having given its judgment accordingly, viz.: to the effect that the estate and the local and domiciliary representatives were alike bound, such judgment, given full faith and credit, must be received here as conclusive upon the estate and its representatives.

1. At the common law, the death of a party to a suit terminated the suit. A different rule was adopted by courts of equity.

"An abatement, in the sense of the common law, is an entire overthrow or destruction of the suit, so that it is quashed and ended. But in the sense of courts of equity, an abatement signifies
311 only a present suspension of all proceedings in the suit, from the want of proper parties capable of proceeding therein. At the common law, a suit, when abated, is absolutely dead. But, in equity, a suit when abated, is (if such an expression be allowable) merely in a state of suspended animation; and it may be revived." Story, Eq. Pl. & Pr., sec. 354.

See, also, Clarke *v.* Mathewson, 12 Pet., 164; Mellus *v.* Thompson, 1 Cliff., 129; Hoxie *v.* Carr, 1 Sumn., 178; Sanford *v.* Sanford, 28 Conn., 6. This rule of the equity courts has been made, in most of the states, the rule of the law courts, by the adoption of statutes which prescribe the practice which shall be followed, in the event of the death of a party to the suit, for the purpose of continuing the suit. Commonly, these statutes apply alike to proceedings at law and in equity. By section 17, chapter 171, Mass. Rev. L. 1902, it is provided:

"If a party to a suit in equity dies and the cause by the rules of equity may be revived against or in favor of an executor, administrator, heir or devisee, or other person, such representative may, in lieu of proceedings to revive the same, appear or be summoned to prosecute or defend in like manner as in an action at law."

Other relevant sections of the statute are sections 5, 6 and 7:

"If the sole plaintiff or defendant in a personal action, the cause of which survives, dies before the entry thereof or of an appeal from a judgment rendered therein, the action or appeal may be entered and his death suggested upon the record. After the entry of such action or appeal and of the suggestion of his death as aforesaid, his executor or administrator may, within such time as the court or trial justice allows, appear and prosecute or defend in the same manner as if the action had been commenced by or against him. If he does not voluntarily appear the court or trial justice before whom the action is pending shall, upon motion of the surviving party, cite him to appear and prosecute or defend it."

"Such citation shall be returnable at such time as the court or trial justice may order and shall be served fourteen days at least before the return day; but it shall not issue after the expiration of two years from the time such executor or administrator has given bond, if he has given the notice of his appointment as required by law."

"If the executor or administrator does not appear on the return of the citation or within such further time as the court or trial justice allows, he shall be non-suited or defaulted and judgment rendered against him in like manner as if the action had been commenced by or against him in his said capacity, except that he shall not be personally liable for costs; but the estate of the deceased in his hands shall be liable for the costs, as well as for the debt or damages recovered."

312 The statute procedure which resulted in the allowance of the will in Massachusetts and in the appointment there of an administrator was essentially a proceeding *in rem*. It was the exercise of the sovereign authority of the state over things within the state. The person appointed administrator was brought upon the record of the equity court as a party to the proceeding there depending and was personally before the court. This in no way enlarged his powers or the duties of his office. They were defined and limited by the law of the forum of his appointment and by the estate of the decedent coming to his possession or under his control.

The ancillary character of his administration was disclosed by the record. The equity court did not, and did not assume to, act upon the estate but upon the administrator. As to him, its decree was satisfied when, giving it due credit and effect, he had distributed the estate according to the law of the forum. That estate has been administered and the decree of the equity court satisfied so far as it is possible to satisfy it by any person upon whom, personally, the court had, in conformity with jurisdiction acquired through its process or by voluntary appearance, authority to impose its judgment.

It is said that

"While a court ought to cease the exercise of its jurisdiction over a party on his death, its failure to do so can only be corrected in a direct proceeding. The court having possessed jurisdiction in the lifetime of the party, and having retained such jurisdiction until the final determination of the suit, its exercise of that jurisdiction, even after the death of a party, is not subject to collateral attack."

The record answers the argument. The suit abated, was revived, and proceeded thereafter against the legal representative of the deceased. The decree is not in form against the deceased; it is in form against his representatives. So, too, the argument that
313 the final decree might have been entered *nunc pro tunc* a day prior to the death of Mr. Fletcher, and being so entered could not be collaterally attacked, is, in the same way, answered. It is not intended, however, to admit that in the case supposed the question mooted could not be raised and determined.

But it is said the executors in Michigan and the administrator in Massachusetts are in privity and, therefore, the decree establishes a valid claim enforcible in this jurisdiction.

"It is our contention," counsel say, "that the administrator with the will annexed had the same powers and duties regarding the administration of Fletcher's estate in Massachusetts as the executors would have had if they had qualified as such in that state; that if a decree could have been made against them, if they had qualified in that state, which would have been valid as a claim against Fletcher's estate in Michigan, then that the decree against the administrator with the will annexed is valid as a claim against that estate in Michigan."

This rests upon the idea that the judgment pronounced, the administrator being properly in court, is a judgment in effect against the estate wherever it may be situated. It rests also further upon the fact that the court had acquired jurisdiction to render a personal judgment against Mr. Fletcher had he survived the litigation—that the suit in which the judgment was pronounced was pending when Mr. Fletcher died.

If Mr. Fletcher had had no estate in Massachusetts, no judgment could have been pronounced there which would bind the executors or the estate, unless the executors had applied and had been admitted to conduct the case. Because, whatever the rule as to survival of equity causes, such causes cannot in fact survive the death

of a party so far as the rights of that party are concerned except by the action of some one with legal authority to represent him. If Mr. Fletcher had left no estate in Massachusetts, there would
314 have been no person and no thing connected with his estate within the jurisdiction of the court. And as it was, the Massachusetts administrator derived none of his interest or powers from Mr. Fletcher. To Mr. Fletcher and his testamentary disposition of property he was a stranger. The notion of the unity or identity of the *res* and the one of the privity of the representatives of the estate, which are essential to the theory of claimant, are not available here. The fact that the administrator in Massachusetts took the title of administrator with the will annexed did not have the effect to create privity with the domiciliary executors. It was the act of a person with interests adverse to those of the estate, permitted by the law of the forum in the interest of creditors of the decedent. In this view, Latine *v.* Clements, 3 Ga. 426, Garland *v.* Garland, 84 Va., 181, and other cases in accord with these, are not authority here. Whatever may be the relations of two or more co-executors, residing in different states, in each of which states the testator left property, and whatever the liability of a sole executor who, for the purpose of administering the estate, secures his own appointment in a state other than that having primary probate jurisdiction, to admit in every jurisdiction the force and validity of a judgment properly pronounced against him in any jurisdiction, it is clear that the domiciliary executor and the estate in the state of decedent's domicile cannot be affected by the acts of a foreign administrator or by any judgment or decree rendered against such foreign administrator in the state of his appointment. And the case is not changed because the suit in which the judgment is rendered against the foreign administrator was pending in the foreign jurisdiction at the time of the death of the testator. In Creighton *v.* Mur-
315 phy, 8 Neb., 349, it appeared that in an action begun against Creighton, in Iowa, he appeared and filed an answer to the petition. He was a resident of Nebraska, and before trial died in that state. The administrator of his estate, appointed in Nebraska, applied to be and was appointed administrator in Iowa upon his petition which alleged as ground for such appointment the pendency of said action. He filed an answer, denying the facts set out in the petition and the jurisdiction of the court. Judgment went against him and he was directed to pay it out of assets of the estate. A transcript of the judgment having been brought into Nebraska, it was there allowed as a claim against the estate in Nebraska. It does not seem to have been claimed by the answer filed in Nebraska that the allowance of the claim in Iowa was not binding upon the Nebraska estate, and the case was heard on demurrer to the answer. In the supreme court, the question is, however, considered and the opinion, recognizing the rule that where administration is granted to different persons in different states they are so far independent of each other that a judgment against one will furnish no right of action against the other, says that as to co-executors the rule is differ-

ent because they derive the same privities from the same estate from the same will, citing Goodall *v.* Tucker, 13 How., 469. It is said,

"Whatever the rule may be as to judgments recovered against ancillary administrators upon claims filed after the death of the intestate, it cannot affect this case. * * * The court had acquired jurisdiction and the death of the defendant did not oust it of that jurisdiction. The court therefore had authority to revive the action against the administrator and to hear and determine the rights of the parties, and such judgment is conclusive as to the matters in issue."

See, also, Mellus *v.* Thompson, 1 Cliff., 125; Judy *et al.*, adm'r, *v.* Kelley, 11 Ill., 211; Greer *v.* Ferguson, 56 Ark., 324.

316 As to claims presented after death of the testator in different jurisdictions, the rule of the federal courts is,

"That as the interest of an executor in the testator's estate is what the testator gives him, while that of an administrator is only that which the law of his appointment enjoins, executors in different States are, as regards the creditors of the testator, executors in privity, bearing to the creditors the same responsibility as if there was only one executor. And that although a judgment obtained against one executor in one State is not conclusive upon an executor in another, yet it is admissible in evidence to show that a demand has been carried into judgment, and the other executors are precluded by it from pleading prescription or the statute of limitations upon the original cause of action." Hill *v.* Tucker, 13 How., 458, *vide* opinion of Fuller, C. J., in Carpenter *v.* Strange, 141 U. S., 87, 104.

In Johnson *v.* Powers, 139 U. S., 156, the following language from the opinion in Stacey *v.* Thrasher, 6 How., 58, is cited with approval:

"In answering the objection that to apply these principles to a judgment obtained in another State of the Union could be to deny it the faith and credit, and the effect, to which it was entitled by the Constitution and laws of the United States, he observed that it was evidence, and conclusive by way of estoppel, only between the same parties, or their privies, or on the same subject-matter when the proceeding was *in rem;* and that the parties to the judgments in question were not the same; neither were they privies, in blood, in law or by estate; and proceeded as follows:

"'An administrator under grant of administration in one State stands in none of these relations to an administrator in another. Each is privy to the testater, and would be estopped by a judgment against him; but they have no privity with each other, in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, encumbered by the same debts.

"'It is for those who assert this privity to show wherein it lies, and the argument for it seems to be this: That the judgment against the administrator is against the estate of the intestate, and that his

estate, wheresoever situate, is liable to pay his debts; therefore the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is *in rem*, and not *in personam*, or that the estate has a sort of corporate entity and unity. But this is not true, either in fact or in legal construction. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another State,
317 liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger.

" 'The laws and courts of a State can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another State is *res inter alios acta*. It cannot be even *prima facie* evidence of a debt; for if it have any effect at all, it must be as a judgment, and operate by way of estoppel.' "

To the same effect are Low *v.* Bartlett, 90 Mass., 259; Ela *v.* Edwards, 95 Mass., 49; Clark *v.* Blackington, 110 Mass., 369. In that state, too, it is held that there is no privity between the executor and an administrator *de bonis non cum testamento annexo*. Grout, adm'r, *v.* Chamberlin, 4 Mass., 611. In that case, the executor after judgment had been rendered against him died, the administrator sued out a writ of error to reverse the judgment. The writ was quashed for the reason stated. Later, a statute was passed to cover the subject.

The Massachusetts administrator and the Michigan executors are not in privity and, considered apart from the effect to be given to the stipulation of the parties, the decree of the Massachusetts court had no force or effect to bind any one except the administrator appointed in that jurisdiction.

2. As to the force and effect to be given to the stipulation signed by Mr. Fletcher.

Certain of the counsel for appellant assert that the instrument is a contract, and that, the awards having been made by the arbitrator and confirmed by the decree of the court, in strict compliance with the contract, the decree is a valid claim against the estate in Michigan by virtue of the provisions of the contract. Of submission to arbitration, generally, it has been said:

"A submission is a contract; consequently the parties must have a general legal capacity to contract." Morse on Arbitration and Award, 1.

318 "Submission is the technical designation of that contract by which parties agree to refer matters which are in dispute, difference, or doubt between them, to be finally decided by the award of judges named by the parties and called arbitrators." *Ibid*, 36.

Other counsel for appellant assert that the stipulation of the parties lacked the essential elements of a contract; that

"The stipulation had no force or efficacy whatever from the mere will and consent of the parties; it had no vitality or legal effective-

ness, until it was accepted and approved by the court. The mere consent of the parties might discontinue the cause and withdraw the issues from the court, but without the rule of the court, which was a judicial act, the case could not be referred. The stipulation, indeed, evidenced the terms upon which the parties had agreed to make the reference, but no efficacy attached to that agreement until after the court had approved it by the entry of its rule of reference. After the court had entered its rule referring the case, it was beyond the power of the parties to modify or revoke. The rule was the act of the court, and it belonged exclusively to the power of the court to modify or set aside its own rule." Haskell *v.* Whitney, 12 Mass., 49; Willey *v.* Durgin, 118 *Id.*, 70.

"The proceedings in the suit belonged to the exclusive power of the court in which the suit was pending, to control. Hence, no right of action could arise out of the stipulation except as the court, from its own view of the justice of the case, might allow." Dist. of Columbia *v.* Bailey, 171 U. S., 161.

The same counsel contends that the court had exclusive control for the purpose of construing and determining the meaning of the stipulation and giving to it the effect contemplated by the parties; such jurisdiction necessarily appertaining to its jurisdiction over the pending suit; that the Massachusetts court has construed the stipulation, has found it to be proper if not necessary, the death of Fletcher having occured, to give notice to the persons upon whom as a class the stipulation was made binding, viz.: the legal representatives of Fletcher, of its construction of the stipulation, summoning and inviting them to come into court and take part in such proceedings as succeeded the death of Fletcher, and that the stipulation by its terms as construed by that court warranted the entry under the circumstances of a judgment against all of the legal representa-
319 tives of Fletcher, which judgment and decree is for the same reasons binding upon the estate of Fletcher wherever situated.

The forum of the arbitration was not one chosen by the parties to the stipulation, and what is asserted here is not the award but is the judgment of a court which had jurisdiction, with or without the stipulation, to determine the issues. This is not an action to enforce, or a suit for damages occasioned by a breach of the stipulation.

It was a not uncommon practice at a time when actions at law, and especially actions *ex delicto*, were wholly abated by the death of one of the parties for orders to be entered by the court either upon the stipulation of the parties or as a condition precedent to the granting of some favor by the court to one or other of the parties, that the death of neither party should abate the action and that it should proceed after such death, if it occurred, precisely as though all parties to the suit had survived the entry of final judgment. In Ames *v.* Webbers, 10 Wend., 575, an action for a tort, defendant asked to put off the trial of a cause for the want of a witness. It being made to appear to the satisfaction of the court that there was reason to apprehend that the defendant might die previous to the next term of court, it was imposed as a condition for putting off the trial that the

defendant stipulate that his death should not abate the suit. The defendant afterwards died. A motion was made to be relieved from the stipulation entered into in compliance with the condition imposed by the judge. It was held that the stipulation was correctly imposed, and the motion was denied. See, also, Cox *v.* N. Y. C., etc., R. Co., 63 N. Y., 414. In Tyler *v.* Jones, 3 B. & C., 144, it appeared that by an order of reference the award was to be delivered to the parties or if they or either of them were dead before the
320 making of the award to their respective personal representatives on or before a given day, with liberty to the arbitrator to enlarge the time for making his award. The plaintiff died before the award was made, and after his death the arbitrator enlarged the time for making the award. It was held that the award made within the enlarged time was good. The rule of the English courts seems to have been that while the death of a party, generally speaking, operated as a revocation of an arbitrator's authority, if the rule provided in express terms for such an event and an award was made under such a rule after the death of a party, it would be valid. To the argument made in the case last cited that the award could not be enforced against the executors of the plaintiff and consequently it ought not to be enforced against the defendant, it was said that it was true that it could not be enforced against the executors by attachment but that an action would lie against the executors upon the undertaking of their testator to perform the award. In Clarke *v.* Crofts, 4 Bingh., 143, Dowse *v.* Coxe, 3 Bingh., 20; Lewin *v.* Holbrook, 11 M. & W., 110, the same rule was recognized and enforced. It was said in Dowse *v.* Coxe, *supra*, by Best, C. J.:

"The engagement is, not that the party will not revoke, but that death shall not abate the arbitration. It has been asked, whether an agreement that a suit shall not abate by death, would enable a court to proceed with the cause; it is not necessary to decide that; for though an agreement of the parties may not give a court jurisdiction, that doctrine does not apply to a domestic forum erected by the parties themselves."

And by Burrough, J., in the same case:

"The law touching revocation, does not apply to this case, which is not the case of a simple authority, but one in which the party expressly binds his effects to the result of the award, and the action is brought against the defendants, only in their representative capacity."

In that case, the arbitrator awarded that the executor of the deceased defendant should pay plaintiff two hundred and twenty-five pounds out of the assets of said deceased defendant, and the
321 action in which the opinion referred to was rendered was a suit brought as upon the promise and undertaking of the executors to perform the award. The original cause in which the arbitration was had was one depending in chancery, and it was ordered, with the consent of the parties, that the matters in question and all disputes between the parties should be referred to a person named to make awards, and in case either of the parties should die,

the death was not to abate that reference. On demurrer to the declaration against the executor of the deceased party, it was held that the promise appeared to have been made by the defendant in his representative capacity and that there was a sufficient award to enable plaintiff to sue.

We are not required to construe or to declare the force and effect of the stipulation. We are asked to rule that the construction and determination of the Massachusetts court bound certain persons not in fact within the jurisdiction of that court and not in fact possessing, in that state, the official character required to admit them to either prosecute or defend suits therein. In none of these cases or our own decision in Weaver *v.* Richards, 13 D. L. N., 327, is such a question involved. The subject-matter of the Massachusetts suit was the differences of the parties to that suit submitted for judicial determination in accordance with the rules and practice of the court. It was not changed by the stipulation; it did not change with the death of Mr. Fletcher. Jurisdiction of the person of Mr. Fletcher was lost when he died. There was then no judgment and, as has been already said, there was no person within the territorial jurisdiction of the court upon whom the determination of the
322 court could be made binding; there was no person, either, in that jurisdiction, whose action, or whose office, made a revival of the suit possible. There was, however, the stipulation of the parties. Counsel do not go so far, but the argument made to support the minor proposition is ineffective unless it supports, also, the major proposition, which is that the court, by virtue of the stipulation alone, had the power—the jurisdiction—to proceed to a final determination of the issues and to enter a judgment binding either upon the *res* or upon the representatives of Mr. Fletcher, as a class. Jurisdiction to bind the *res* was not asserted. Jurisdiction to bind the representatives was asserted. The argument that from and after the confirmation of the agreement of the parties by the rule of court the legal representatives of Mr. Fletcher, as a class, were potentially before the court, and that when the identity of the individuals of the class was established those individuals were subject to the future orders of the court in the pending suit, is unsound. Jurisdiction to construe and declare the meaning and effect of the stipulation, if it existed, is not jurisdiction to impose the construction and declaration made upon persons not before the court nor could the court by declaring the meaning and effect of the instrument bring before it, and clothe with the necessary official character, individuals who were in fact beyond its jurisdiction. These conclusions appear to me to be legally axiomatic.

It must be held that the proceeding in the Massachusetts court abated with the death of Mr. Fletcher, that its revival was possible only because there was brought into existence, by the exercise of the sovereign power of the state, a representative of the decedent, clothed with certain powers with respect to the estate of decedent
323 within the state, and that the decree thereafter rendered, in the suit so revived, is without effect save upon the adminis-

trator of the estate who was, in accordance with the law of the place, brought upon the record.

It follows that the judgment should be, and it is affirmed.

RUSSELL C. OSTRANDER.
WILLIAM L. CARPENTER.
CHAS. A. BLAIR.
AARON V. McALVAY.
JOSEPH B. MOORE.

(Endorsed:) Filed Nov. 13, 1906. Chas. C. Hopkins, Clerk.

324 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the thirteenth day of November in the year of our Lord one thousand nine hundred and six.

Present, the Honorable William L. Carpenter, Chief Justice. Aaron V. McAlvay, Claudius B. Grant, Charles A. Blair, Robert M. Montgomery, Russell C. Ostrander, Frank A. Hooker, Joseph B. Moore, Associate Justices.

Judgment.

21408.

ALBERT W. BROWN, Claimant and Appellant,
vs.
The Estate of GEORGE N. FLETCHER, Deceased, Defendant.

The record and proceedings in this cause having been removed to this court by Writ of Error, issued to the Circuit Court for the County of Wayne, and the same, and the matters in Error assigned, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court there is no error. Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Wayne be and the same is hereby in all things affirmed, and that the defendant do recover of the claimant, its costs, to be taxed, and that it have execution therefor.

325 UNITED STATES OF AMERICA, *State of Michigan:*

Petition for Writ of Error.

To the Honorable Aaron V. McAlvay, Chief Justice of the Supreme Court of the State of Michigan:

Your petitioner, Albert W. Brown, of Boston, Massachusetts, respectfully shows that on or about April 6, 1904, he presented a claim for $404,254.12, and interest thereon at the rate of six per cent. per annum from April 14, 1903, against the estate of George N. Fletcher, deceased, to the commissioners on claims appointed by the Probate

Court for the County of Wayne, State of Michigan, for examination and allowance, which claim was based upon the final decree of the Supreme Judicial Court in Equity for the County of Suffolk, State of Massachusetts, in the case of Rufus H. Spalding, Administrator of the Estate of William White, deceased, plaintiff, *vs.* George N. Fletcher, James Campbell, and Eliza White, defendants; that on or about December 2, 1904, said commissioners filed a report in said Probate Court by which they wholly disallowed said claim; that afterwards your petitioner duly appealed to the Circuit Court for the County of Wayne, State of Michigan, from the decision of said commissioners; that on June 22, 1905, said cause came on for trial in said Circuit Court before Hon. Flavius L. Brooke, Circuit Judge, and a jury duly impaneled; that on said trial certain evidence was introduced, including a duly authenticated transcript of the records and proceedings in the said suit of Rufus H. Spalding, Administrator of the Estate of William White, deceased, plaintiff, *vs.* George N. Fletcher, James Campbell, and Eliza White, defendants; that at the close of the proofs on said trial said Circuit Judge overruled a motion made by counsel for petitioner for a directed verdict in his
326 favor, and granted a motion made by counsel for the Estate of George N. Fletcher, deceased, for a directed verdict in its favor; that on September 9, 1905, judgment was entered on said verdict in favor of the Estate of George N. Fletcher, deceased, by which the disallowance of said claim by the decision of said commissioners was affirmed with costs; that on November 2, 1905, your petitioner made a motion in said Circuit Court for a new trial, which motion said Circuit Judge denied, all of which will appear by reference to the bill of exceptions settled in said Circuit Court; that afterwards your petitioner duly sued out a writ of error from the Supreme Court of the State of Michigan to said Circuit Court for the correction of the errors which he claimed had been committed on said trial; that on November 13, 1906, said Supreme Court, after due consideration of said alleged errors, rendered final judgment against your petitioner by which it affirmed with costs the judgment of said Circuit Court; that said Supreme Court is the highest court of said State in which a decision in said suit can be had.

Your petitioner further shows that in both said Circuit Court and said Supreme Court he contended that said final decree of said Supreme Judicial Court in Equity was valid as a claim against the said Estate of George N. Fletcher, deceased, under Article 4, Sec. 1, of the Constitution of the United States, and Sec. 905 of the Revised Statutes of the United States, but that both said courts failed to give full faith and credit to the records and judicial proceedings in said case of Rufus H. Spalding, Administrator of the Estate of William White, deceased, plaintiff, *vs.* George N. Fletcher, James Campbell, and Eliza White, defendants, in the Supreme Judicial Court
327 in Equity for the County of Suffolk, State of Massachusetts, in accordance with said Article 4, Sec. 1, and failed to give to the records and judicial proceedings such faith and credit as they have by law or usage in the Courts of the State of Massachusetts, in accordance with said Sec. 905, all of which will appear by reference

to the record and judicial proceedings in said cause which is herewith submitted, and from the assignments of error attached to this petition.

Wherefore, your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Michigan, and for citation and supersedeas, etc.

And your petitioner will ever pray.

ALBERT W. BROWN, *Petitioner.*
By HARRISON GEER, *His Attorney.*

328 UNITED STATES OF AMERICA:

Supreme Court of the State of Michigan.

ALBERT W. BROWN, Plaintiff in Error,
vs.
The Estate of GEORGE N. FLETCHER, Deceased, Defendant in Error.

The above entitled matter coming on to be heard upon the petition of the plaintiff in error for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Michigan, and upon examination of said petition and the record in this matter, and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the questions presented by the record in said cause, it is ordered that a writ of error be, and is hereby, allowed to this court from the Supreme Court of the United States, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of one thousand Dollars.

Dated at Lansing, this 2d day of January A. D. 1907.

AARON V. McALVAY,
Chief Justice Supreme Court
of the State of Michigan.

Filed in my office this 2nd day of January A. D. 1907.

CHAS. C. HOPKINS,
Clerk of the Supreme Court
of the State of Michigan.

329 UNITED STATES OF AMERICA:

Supreme Court of the State of Michigan.

ALBERT W. BROWN, Plaintiff in Error,
vs
The Estate of GEORGE N. FLETCHER, Deceased, Defendant in Error.

Now comes plaintiff in error and respectfully submits that in the record, proceedings, decision, and final judgment of the Supreme Court of the State of Michigan, in the above entitled cause, there is manifest error in this, to-wit:

First. The said court erred in rendering final judgment affirming with costs the judgment of the Circuit Court for the County of

Wayne, State of Michigan, by which the disallowance of the claim of plaintiff in error against the Estate of George N. Fletcher, deceased, by the commissioners on claims was affirmed.

Second. Said court erred in not reversing the said judgment of the said Circuit Court, and in not entering judgment allowing the claim of plaintiff in error against the Estate of George N. Fletcher, deceased, for the full amount due him under the decree of the Supreme Judicial Court in Equity for the County of Suffolk, State of Massachusetts.

Third. Said court erred in not sustaining the first assignment of error upon the record in said cause.

Fourth. Said court erred in not sustaining the second assignment of error upon the record in said cause.

330 Fifth. Said court erred in not sustaining the third assignment of error upon the record in said cause.

Sixth. Said court erred in not sustaining the fourth assignment of error upon the record in said cause.

Seventh. Said court erred in not sustaining the fifth assignment of error upon the record in said cause.

Eighth. Said court erred in not sustaining the sixth assignment of error upon the record in said cause.

Ninth. Said court erred in not sustaining the seventh assignment of error upon the record in said cause.

Tenth. Said court erred in not sustaining the eighth assignment of error upon the record in said cause.

Eleventh. Said court erred in not sustaining the ninth assignment of error upon the record in said cause.

Twelfth. Said court erred in not sustaining the tenth assignment of error upon the record in said cause.

Thirteenth. Said court erred in not sustaining the eleventh assignment of error upon the record in said cause.

Fourteenth. Said court erred in not sustaining the twelfth assignment of error upon the record in said cause.

Fifteenth. Said court erred in not sustaining the thirteenth assignment of error upon the record in said cause.

Sixteenth. Said court erred in failing to give full faith and credit to the records and judicial proceedings in the case of Rufus Spalding, administrator of the estate of William White, deceased, plaintiff, *vs.* George N. Fletcher, James Campbell, and Eliza White, defendants, in the Supreme Judicial Court in Equity for the County of Suffolk, State of Massachusetts, in accordance with Article 4, Section 1, of the Constitution of the United States.

331 Seventeenth. Said court erred in failing to give to the records and judicial proceedings in the case of Rufus Spalding, administrator of the estate of William White, deceased, plaintiff, *vs.* George N. Fletcher, James Campbell, and Eliza White, defendants, in the Supreme Judicial Court in Equity for the County of Suffolk, State of Massachusetts, such faith and credit as they have by law or usage in the courts of the State of Massachusetts, in accordance with Section 905 of the Revised Statutes of the United States.

Eighteenth. Said court erred in rendering judgment against plain-

tiff in error and in favor of defendant in error for costs of suit in said Supreme Court.

Wherefore, said Albert W. Brown, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said Supreme Court for the State of Michigan in the above entitled cause, to the prejudice of the plaintiff in error, the said judgment of the said Supreme Court of the State of Michigan be reversed, annulled, and for naught esteemed, and that said cause be remanded to the Supreme Court of the State of Michigan with instructions to enter judgment in favor of the plaintiff in error for the full amount due him under the said decree of the said Supreme Judicial Court in Equity, or for such further proceedings in said cause as may be determined upon by this Honorable Court, to the end that justice may be done in the premises.

HARRISON GIER,
Attorney for Plaintiff in Error.

331½ [Endorsed:] 21408. Supreme Court. Albert W. Brown Pl'ff in error *vs.* Estate of George N. Fletcher deceased Def't in error. Petition for writ of error to U. S. Sup. Ct. Order allowing writ of error, and assignments of error. Filed Jan. 10, 1907. Chas. C. Hopkins, Clerk.

332 UNITED STATES OF AMERICA, *ss*

To the Estate of George N. Fletcher, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Michigan wherein Albert W. Brown, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Aaron V. McAlvay, Chief Justice of the Supreme Court of the State of Michigan, this Second day of January, in the year of our Lord one thousand nine hundred and seven.

[Seal of the Supreme Court of Lansing, Michigan.]

AARON V. McALVAY,
Chief Justice of the Supreme Court of the State of Michigan.

[Endorsed:] 21408. Filed Jan. 12, 1907. Chas. C. Hopkins, Clerk.

Service of foregoing citation accepted Jan. 11, 1907. Est. Geo. N. Fletcher.

RUSSEL, CAMPBELL & BUCKLEY,
Att'ys for Estate.

333 *Bond.*

Know all men by these presents, That we Albert W. Brown, Boston, Mass., as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto The Estate of George N. Fletcher, deceased, in the full and just sum of One Thousand (1,000) dollars to be paid to the said The Estate of George N. Fletcher, deceased, or its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of January, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a session of the Supreme Court of the State of Michigan, in a suit depending in said Court, between Albert W. Brown, plaintiff and appellant, and the Estate of George N. Fletcher, deceased, defendant and appellee, a final judgment, was rendered against the said Albert W. Brown and the said Albert W. Brown having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid, suit, and a citation directed to the said The Estate of George N. Fletcher, deceased, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Albert W. Brown shall prosecute his said writ of error, to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ALBERT W. BROWN. [SEAL.]
FIDELITY AND DEPOSIT CO. OF MARYLAND,
By JOHN RYAN, JR.,
Agent and Att'y in Fact.

Attest:

CHAS. WHITAKER,
Agent and Att'y in Fact.
[SEAL.]

Sealed and delivered in presence of—

CORNELIUS LUCKERHOFF.
FREDERICK L. CORCORAN.

Approved by—

AARON V. McALVAY,
Chief Justice of the Supreme Court of the State of Michigan.

(Endorsed:) Filed Jan. 10, 1907. Chas. C. Hopkins, Clerk.

334 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Michigan before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Albert W. Brown, plaintiff and The Estate of George N. Fletcher, deceased, Defendant wherein was drawn in question the vaildity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause
335 of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Albert W. Brown, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the Second day of January, in the year of our Lord one thousand nine hundred and seven.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States for Eastern District of Michigan.

Allowed by
AARON V. McALVAY,
Chief Justice of the Supreme Court of the State of Michigan.

336 [Endorsed:] 21408. Filed Jan. 10, 1907. Chas. C. Hopkins, Clerk.

To the Supreme Court of the United States:

The execution of the within Writ appears by the transcript of record, hereto annexed.

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Dated Lansing, Mich., 30th January A. D. 1907.

337 Supreme Court of the State of Michigan.

ALBERT W. BROWN, Plaintiff in Error,
vs.
The Estate of GEORGE N. FLETCHER, Deceased, Defendant in Error.

STATE OF MICHIGAN, *In Supreme Court, ss:*

I, Charles C. Hopkins, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all the proceedings had and determined in the above entitled cause by said Supreme Court, including the written decision and reasons therefor, signed by the Judges of said Court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original, and it is a true transcript therefrom and of the whole thereof; that attached thereto are the petition for the writ of error, with assignments of error, the writ of error, with allowance endorsed thereon, the citation, with acceptance of service endorsed thereon, and a copy of the bond to the adverse party, duly approved.

In testimony whereof I have hereunto set my hand and affixed the seal of said Supreme Court, at the City of Lansing, this thirtieth day of January in the year of our Lord one thousand nine hundred and seven.

[Seal of the Supreme Court of Lansing, Michigan.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: File No. 20,557. Michigan supreme court. Term No. 220. Albert W. Brown, plaintiff in error, *vs.* The Estate of George N. Fletcher, deceased. Filed February 2d, 1907. File No. 20,557.

FILED
MAR 24 1908
JAMES H. MCKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 220.

ALBERT W. BROWN, PLAINTIFF IN ERROR,

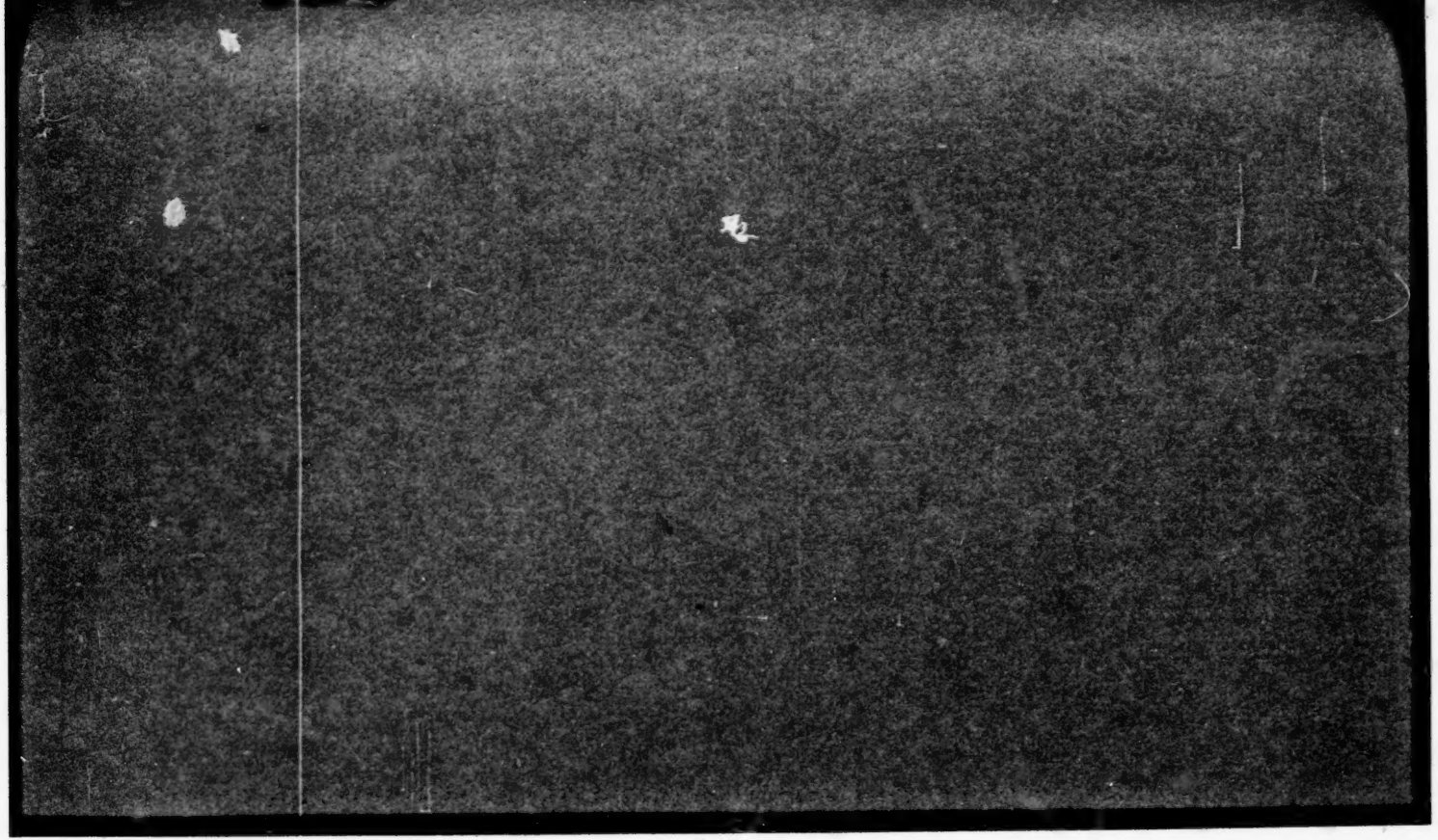
vs.

THE ESTATE OF GEORGE N. FLETCHER, DECEASED.

BRIEF FOR PLAINTIFF IN ERROR.

HARRISON GRAY,
Attorney for Plaintiff in Error.

DISTRICT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
1908.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 220.

ALBERT W. BROWN, PLAINTIFF IN ERROR,

vs.

THE ESTATE OF GEROGE N. FLETCHER, DECEASED.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The plaintiff in error in this case is Albert W. Brown, of Boston, Massachusetts. The defendant in error is the Estate of George N. Fletcher, deceased, which is in process of administration in the Probate Court of Wayne County, Michigan, Fletcher having been a resident of Detroit, Michigan, at the time of his death. The matter in controversy is the efficacy of the decree of the Supreme Judicial Court in Equity for Suffolk County, Massachusetts, in the case of Rufus H. Spalding, administrator of the estate of William White, deceased, plaintiff, vs. George N. Fletcher, James Campbell and Eliza White, defendants, as evidence of debt in this proceeding against the estate of George N. Fletcher, deceased. Fletcher died November 5th, 1899, and Brown presented this decree to the Commissioners on Claims, appointed by the Probate Court of Wayne County, pursuant to the statutes of that State (Chap. 252, Mich., Com. L. of 1897) for examination and allowance as a claim against his estate. The commissioners disallowed the claim and Brown

appealed to the Circuit Court of Wayne County. On the trial in the Circuit Court, the Circuit Judge directed a verdict for the defendant, and plaintiff removed the case to the Supreme Court of Michigan by writ of error. The Supreme Court affirmed the judgment of the Circuit Court (its decision being reported in 146 Mich., 401), and Brown has brought the case to this Court by writ of error.

The case of Rufus H. Spalding, administrator of the estate of William White, deceased, plaintiff, vs. George N. Fletcher, James Campbell and Eliza White, defendants, was commenced April 24, 1874, by the filing of a bill of complaint in the Supreme Judicial Court in Equity for Suffolk County, Massachusetts (R., p. 13). Subpoena was personally served upon Fletcher and Campbell within the territorial jurisdiction of that court, and upon Eliza White by leaving a copy at her last place of abode, and each appeared and filed an answer (R., pp. 14-24). On April 24, 1879, an order of reference was made to Francis W. Hurd, as master (R., pp. 24-5), and it is from his reports, filed in the court on August 31, 1887 (R., p. 45), and April 15, 1891 (R., p. 49), that we learn the facts out of which arose the litigation. A brief statement of the facts reported by him will, we believe, be not only of interest but useful to this court in the consideration of this case, because it will show the precise nature of the subject matter of that suit.

On March 13, 1856, one Thomas Campbell, of Boston, Mass., and George N. Fletcher, then of St. Clair, Mich., entered into a written agreement whereby Campbell agreed to invest $6,000 (and such further sums as he might elect) in pine lands to be selected by Fletcher in the vicinity of Thunder Bay River and its tributaries in the State of Michigan. Campbell was to purchase land warrants and Fletcher was to select the lands under these warrants. The lands were to be entered at the United States Land Office in the name of Campbell as security for the moneys invested by him. Campbell was to be repaid the money advanced by him out of the proceeds of the first sales of land. The net profits were to be divided equally between Campbell and Fletcher (R., p. 26).

Fletcher had become familiar with the value and location of the unoccupied lands of the United States and

with the business of locating land warrants (R., p. 25). Acting under this agreement, he located 15,814 acres of pine lands under land warrants bought by Campbell. The warrants had cost Campbell $16,439.53, and the lands were entered in his name in accordance with the agreement (R., p. 27). Campbell died July 16, 1857. At the time of his death he was indebted to one William White of Boston, a printer by occupation, in the sum of $17,438.67. The money invested by Campbell in the land warrants had been borrowed from White (R., p. 27). It is thus seen that, as a matter of fact, White, not Campbell, had actually paid for the 15814 acres of pine land. The claim of White against Campbell's estate was duly allowed by the Probate Court of Suffolk County, Mass., and $8438.67 thereof was paid to White by a one-quarter interest in the 15814 acres of pine lands, which were conveyed by John Campbell, sole heir at law of Thomas Campbell, by deed dated December 10th, 1859, to Fletcher, James Campbell, a brother of Thomas, and White, described as "co-partners," known under the firm name of the Thunder Bay Lumber Company, and by note of John Campbell for $958.67 (R., pp. 27-8).

In the settlement between Fletcher and the administrator of the Thomas Campbell estate, it was agreed that Fletcher was indebted to the estate in the sum of $10,031.37, under the agreement of March 13, 1856, and he paid this amount by promissory note for $1,031.37 to the administrator, afterward paid in cash, and by an instrument described as "one acceptance of Geo. N. Fletcher, dated June 1, 1858, accepted by William White, January 26, 1859, $9,000," called the $9,000 obligation. This $9,000 obligation was accepted by White in payment of the balance of his claim against the Thomas Campbell estate (R., pp. 28-9).

Besides his interest in the 15,814 acres of pine lands, Fletcher was also the owner, in and before the year 1859, of an undivided one-half interest in about 450 acres of land, situated on both sides of Thunder Bay River, which lands are now part of the City of Alpena, Mich. These lands were known as the Mouth of the River lands, also as the Bailey and Lockwood and Minor purchases. Partition was made of these lands in October, 1865, and one-half thereof was conveyed to Fletcher (R., p. 29).

In January, 1859, Fletcher, James Campbell and White executed a written agreement, dated September 1, 1858, whereby they agreed to "form themselves into a company" to be called the Thunder Bay Lumber Company. It was agreed that the capital stock of the company should be $66,000, of which Fletcher was to contribute $33,000, and James Campbell and White $33,000; that the $33,000 to be contributed by Fletcher should consist of his interest in the 15,814 acres of pine lands, which it was agreed should be considered worth $15,000, and his undivided one-half interest in the Mouth of the River lands, which it was agreed should be considered worth $18,000; that the $33,000 to be contributed by James Campbell and White should consist of their interest in the 15,814 acres of pine lands, which it was agreed should be considered worth $15,000, and the balance, $18,000, in cash. The profits and losses were to be divided equally between Fletcher on the one part and James Campbell and White on the other (R., pp. 29-30).

As we have seen, the 15,814 acres of pine lands were conveyed to the parties to this agreement by John Campbell by deed, dated December 10, 1858. Fletcher never conveyed to them the legal title to his one-half interest in the Mouth of the River lands (R., p. 48). White surrendered the $9,000 obligation to Fletcher, who accepted it in lieu of White's share of the $18,000 agreed to be contributed in cash by James Campbell and White (R., pp. 30-48). James Campbell never made any payment under the agreement (R., pp. 30-48). After the execution of the agreement, dated September 1, 1858, the management of the lands was intrusted to Fletcher. He made improvements on the Mouth of the River lands and opened an account in his ledger under date of April 1, 1859, in which he charged one-half of the disbursements on account of said lands to White. This ledger also contained accounts in connection with his management of the 15,814 acres of pine lands. Various settlements were had between Fletcher and White. Up to July 13, 1861, White had advanced to Fletcher $11,558.55 in cash in addition to the $9,000 obligation (R., pp. 31-48). As we have said, White had advanced $17,438.67 to Campbell, which, added to the $11,558.55, makes $28,997.22, the total he invested in the venture. White died on April 28, 1873, leaving a widow, Eliza White, and a daughter by a former marriage, Frances M., who was the wife of Albert W. Brown, the plaintiff in error.

The widow, Eliza, was a sister of Thomas and James Campbell (R., p. 25).

After White's death, Fletcher denied that White had had any interest whatever in the 15,814 acres of pine lands and in the Mouth of the River lands, and the administrator of White's estate brought the suit in the Supreme Judicial Court in Equity for Suffolk County for an accounting and discovery with respect to these lands. As White's title to a one-fourth interest in the 15,814 acres of pine lands was of record, there was slight ground for controversy in respect to those lands. Title to the Mouth of the River lands, however, was in Fletcher, and he strenuously insisted that White had made no payment under the contract of September 1, 1858, and therefore that White had never become the owner of any interest in those lands. The administrator of White's estate claimed that White had surrendered to Fletcher the $9,000 obligation in payment for an interest in those lands. It is thus seen that the $9,000 obligation became the chief "bone of contention" in the controversy. It appears to have been Fletcher's object to conceal the receipt from White of the $9,000 obligation as payment for an interest in the lands. He produced before the master a writing, which he evidently claimed was the original of the $9,000 obligation, but which the master found was not the original, and which must therefore have been a forgery, upon which he had made false and fictitious endorsements of payments (R., pp. 28-9). He also produced before the master numerous books and papers, which bore evidence, the master found, of alterations, erasures and mutilations of entries touching transactions between him and White in respect to these lands (R., pp. 30-1).

After the reports of the master were filed, which it is seen were strongly adverse to Fletcher, an agreement was entered into on April 4th, 1892, between Spalding, as administrator, Fletcher, and Frances M. Brown, who at that time became a party to the suit (R. pp. 53-4), whereby the parties agreed to submit to arbitration all claims and demands in that suit, and all claims and demands which either party might have against the other. It was agreed that the arbitration should be under rule of court and that it should not operate as a discontinuance of the suit. It was further agreed that the death of any party thereto should not revoke the submission, but that the arbitration should continue, and that the successors

of Spalding, and the legal representatives of Fletcher and Frances M. Brown, should be bound by the final award therein. It was further agreed that the arbitrator should first pass upon the question of liability or non-liability, and that in case he found a liability existed, the parties should have a reasonable time within which to produce evidence and determine the amount of such liability. It was further agreed that when the final award should be made by the arbitrator, either party might apply to the court for a decree to enforce the same, or that the same might be enforced by a decree of any other court having jurisdiction of the parties (R. pp. 51-53).

Hon. William L. Putnam (then and now United States Circuit Judge for the First Circuit) was finally selected by the parties as arbitrator, and was appointed as such by the court (R., p. 58). On May 22d, 1894, he filed his preliminary award (R., p. 78). By this award, he found that White was the owner, at the time of his death, of a one-fourth interest in the 15,814 acres of pine lands, and also of a one-fourth interest in Fletcher's one-half interest in the Mouth of the River lands, which, as has been said, had been partitioned in 1865; that the legal title to the 15,814 acres of pine lands was then in Fletcher, James Campbell and White; that the legal title to a one-half interest in the Mouth of the River lands, which had been partitioned in 1865, was then in Fletcher, but that he was holden to convey, under the agreement dated Sept. 1st, 1858, a one-fourth interest therein to Frances M. Brown, as sole heir-at-law of White; that Fletcher had sold or otherwise disposed of certain of said lands, the 15,841 acres of pine lands and the Mouth of the River lands, prior to Aug. 15th, 1871, on which date there had been a settlement between Fletcher and White, by which a certain balance was then agreed to be due from Fletcher to White; that between that date and the date of White's death Fletcher also sold or otherwise disposed of certain of said lands; that after White's death, Fletcher had also sold or otherwise disposed of a large part of said lands. He therefore found that Fletcher was liable to account to Frances M. Brown, as administratrix of White's estate, she having succeeded Spalding as such on his death, on July 15th, 1892 (R., p. 59), for the balance due from Fletcher to White on August 15th, 1871, and for her proportion (one-fourth) as such administratrix of the money and property received by him from the sale or other disposition of the lands as aforesaid between that date and the date of White's death; that he was liable to account

to her individually, as sole heir-at-law of White, for her proportion (one-fourth) of the money or other property received by him from the sale or other disposition of the lands as aforesaid after the death of White (R., pp. 59-66.)

The matter in regard to which there was the most serious controversy between the parties, both before the master and up to that time before the arbitrator, was whether White had any interest in the Mouth of the River lands, and if so, whether his interest was one-fourth or one-half thereof. The master found by his first report that he had a one-half interest therein (R., p. 30). The arbitrator found that he had a one-fourth interest therein (R., pp. 60-61). Whether he had any interest therein depended upon whether he had surrendered to Fletcher the $9,000 obligation as a payment or contribution under the contract of Sept. 1st., 1858. This $9,000 obligation was, as we have stated, the "bone of contention." Both the master and the arbitrator decided that it was surrendered to Fletcher by White as a payment under that contract. In finding that White had a one-half interest in the Mouth of the River lands, the master apparently acted upon the theory that, as he had contributed, in addition to the $9,000 obligation, $11,558.55, making $20,558.55, considerably more than the $18,000 in cash agreed to be contributed by White and Campbell, and as Campbell had never made any payment, White was entitled, not only to his one-fourth interest, but also to the one-fourth interest which would have vested in Campbell (R., pp. 30-31). By his second report, he modified his first report and made no finding as to whether any interest in the Mouth of the River lands vested in White (R., p. 48). In finding that White had a one-fourth interest in the Mouth of the River lands, the arbitrator acted upon the theory that Campbell had never transferred to White the one-fourth interest which would have vested in him (R., p. 65.) By his first request for findings of fact presented to the arbitrator, Fletcher admitted that White had a one-fourth interest in the 15,814 acres of pine lands (R., pp. 71-72). As Fletcher had sold or otherwise disposed of a large part of said lands as aforesaid, the arbitrator found him liable to account therefor in the manner above stated.

After the preliminary award was made by the arbitrator, he proceeded to determine the amount due Frances M. Brown, as administratrix and individually, under the

terms thereof. Fletcher appeared personally before him, as also did his attorney, while this amount was being determined (R., p. 108). Before the arbitrator had finally determined the amount due, and on Novebmer 5th, 1899, Fletcher died testate at Detroit, his domicile, leaving an estate, the appraised value of which was $575,809.02 (R., p. 3). By his will, he made his children, Grace, Frank W. and Allan M. Fletcher, his residuary legattes (R., p. 176). The greater portion of his estate was situated in Michigan, and his two sons, Frank W. and Allan M., were appointed executors of his last will by the Probate Court of Wayne County (R., p. 175). Fletcher was the owner, at the time of his death, of a small amount of real estate in Middlesex County, Mass. (R., p. 159), which was afterwards sold for $350 (R., p. 162). Frank B. Cotton, of Brookline, Mass., was duly appointed administrator with the will annexed of his estate in Massachusetts, and duly qualified as such (R., pp. 156-8).

Fletcher's death was duly suggested of record in the suit pending in the Supreme Judicial Court in Equity for Suffolk County and the suit was duly revived in accordance with the statutes of Massachusetts against Frank B. Cotton, administrator with the will annexed of his estate (R., pp. 78-80). Notice to appear and take upon themselves the defense of the suit in accordance with a decree of the court was also personally served in Michigan upon Frank W. and Allan M. Fletcher, executors of the last will of George N. Fletcher, and also upon Grace, Frank W., and Allan M. Fletcher, the children and residuary legatees under the will of George N. Fletcher (R., pp. 92, 95, 98, 101, 102), but they did not appear and their default was taken (R., p. 105).

Frances M. Brown died December 3rd, 1902, and was succeeded as administrator of White's estate by Albert W. Brown (R., pp. 164-5). She was the sole heir-at-law of William White (R., p. 60), and by her will she made Albert W. Brown her sole legatee and devisee (R., pp. 167-8), and he was duly appointed executor thereof. On December 30th, 1902, petitions were filed by Albert W. Brown, administrator *de bonis non* of the estate of William White, Albert W. Brown, executor of the last will of Frances M. Brown, and Albert W. Brown, individually, for leave to become parties to the suit, and these petitions were duly allowed by the court (R., pp. 105-107).

On February 5th, 1903, the arbitrator filed his final award (R., p. 121). By this award, he found that the

estate of George N. Fletcher was indebted to Albert W. Brown, administrator *de bonis non* of the estate of William White, in the sum of $35,669.63 (R., p. 118), and that the estate of George N. Fletcher was indebted to Albert W. Brown, executor of the last will of Frances M. Brown, in the sum of $347,225.11 (R., p. 118); that the estate of George N. Fletcher was also liable for the costs of arbitration, amounting to $11,478.13 (R., p. 120), and that this amount should be divided between Albert W. Brown, as administrator and executor, in proportion to the amounts awarded him in those capacities (R., pp. 107-121).

On April 14th, 1903 (R., p. 149), the Supreme Judicial Court in Equity for Suffolk County confirmed the two awards of the arbitrator (R., p. 148), and adjudged and decreed that it had been satisfactorily made to appear to the court that Albert W. Brown had succeeded to all the rights and interests of Spalding, administrator of White's estate, and of Frances M. Brown (R., p. 148). The court therefore adjudged and decreed that he recover from Frank B. Cotton, administrator with the will annexed of George N. Fletcher, the sum of $394,3[illegible]2.87 (the amount awarded Albert W. Brown as administrator and executor by the arbitrator), and $4,495.85 as interest (R., p. 148), and the costs of suit, which were afterwards taxed at $5,385.40 (R., p. 150). It was further adjudged and decreed that the Michigan executors of the last will of George N. Fletcher (Frank W. and Allan M. Fletcher) are bound by the final award of the arbitrator and are liable to pay to Albert W. Brown the aforesaid sums; also that the legal representatives of George N. Fletcher are bound by said award and are liable for any deficiency (R., pp. 122-149).

Brown was unable to obtain satisfaction of this decree in Massachusetts, and therefore, as aforesaid, presented it as a claim against the estate of George N. Fletcher in Michigan, and the Commissioners on Claims, the Circuit Court of Wayne County, and the Supreme Court of Michigan, have all, as aforesaid, disallowed the claim. He has therefore sued out a writ of error from this court and has assigned as error that the Michigan courts failed to give full faith and credit to the records and judicial proceedings of the Supreme Judicial Court in Equity for Suffolk County in accordance with Sec. 1, Art. 4, of the Constitution of the United States, and Sec. 905, United States Revised Statutes.

Assignments of Error Relied On.

The plaintiff in error relies upon each and all of his assignments of error, viz:

First. The Supreme Court of the State of Michigan erred in rendering final judgment affirming with costs the judgment of the Circuit Court for the County of Wayne, State of Michigan, by which the disallowance of the claim of plaintiff in error against the estate of George N. Fletcher, deceased, by the commissioners on claims was affirmed.

Second. Said court erred in not reversing the said judgment of said Circuit Court, and in not entering judgment allowing the claim of plaintiff in error against the estate of George N. Fletcher, deceased, for the full amount due him under the decree of the Supreme Judicial Court in Equity for the County of Suffolk, State of Massachusetts.

Third. Said court erred in not sustaining the first assignment of error upon the record in said cause.

Fourth. Said court erred in not sustaining the second assignment or error upon the record in said cause.

Fifth. Said court erred in not sustaining the third assignment of error upon the record in said cause.

Sixth. Said court erred in not sustaining the fourth assignment of error upon the record in said cause.

Seventh. Said court erred in not sustaining the fifth assignment of error upon the record in said cause.

Eighth. Said court erred in not sustaining the sixth assignment of error upon the record in said cause.

Ninth. Said court erred in not sustaining the seventh assignment of error upon the record in said cause.

Tenth. Said court erred in not sustaining the eighth assignment of error upon the record in said cause.

Eleventh. Said court erred in not sustaining the ninth assignment of error upon the record in said cause.

Twelfth. Said court erred in not sustaining the tenth assignment of error upon the record in said cause.

Thirteenth. Said court erred in not sustaining the eleventh assignment of error upon the record in said cause.

Fourteenth. Said court erred in not sustaining the twelfth assignment of error upon the record in said cause.

Fifteenth. Said court erred in not sustaining the thirteenth assignment of error upon the record in said cause.

Sixteenth. Said court erred in failing to give full faith and credit to the records and judicial proceedings in the case of Rufus Spalding, administrator of the estate of William White, deceased, plaintiff, vs. George N. Fletcher, James Campbell, and Eliza White, defendants, in the Supreme Judicial Court in Equity for the County of Suffolk, State of Massachusetts, in accordance with Article 4, Section 1, of the Constitution of the United States.

Seventeenth. Said court erred in failing to give to the records and judicial proceedings in the case of Rufus Spalding, administrator of the estate of William White, deceased, plaintiff, vs. George N. Fletcher, James Campbell, and Eliza White, defendants, in the Supreme Judicial Court in Equity for the County of Suffolk, State of Massachusetts, such faith and credit as they have by law or usage in the courts of the State of Massachusetts, in accordance with Section 905 of the Revised Statutes of the United States.

Eighteenth. Said court erred in rendering judgment against plaintiff in error and in favor of defendant in error for costs of suit in said Supreme Court.

R., pp. 200-2.

The Federal Question Involved.

It is the contention of plaintiff in error that the Michigan courts failed to give full faith and credit to the records and judicial proceedings of the Supreme Judicial Court in Equity for Suffolk County, Mass., in accordance with Section 1, Article 4, of the Constitution of the United States, and Section 905 of the United States Revised Statutes. By his formal proof of claim filed with the commissioners on claims, he claimed that said record and judicial proceedings should be given full faith and credit (R., pp. 9-10); in the Circuit Court of Wayne County, he moved for a new trial on the ground that said court had failed to give full faith and credit thereto (R., pp. 7-9); in his assignments of error filed in the Supreme Court of Michigan, he assigned as error that the Circuit Court of Wayne County had failed to give full faith and credit thereto (R., p. 177); and in his assignments of error filed in this court, he has assigned as error that the Supreme Court of Michigan failed to give full faith and credit thereto (R., pp. 200-2). It is thus clear that the Federal question has been seasonably and properly raised, and that this court has jurisdiction under section 709, United States Revised Statutes, on this writ of error to the Supreme Court of Michigan.

Green vs. Van Buskirk, 5 *Wall.*, 307.
Crapo vs. Kelly, 16 *Wall.*, 621.
Carpenter vs. Strange, 141 *U. S.*, 103.
Winona, etc., R. R. vs. Plainview, 143 *U. S.*, 390.
Huntington vs. Attrill, 146 *U. S.*, 666.
Hancock Bank vs. Farnum, 176 *U. S.*, 642.
Jacobs vs. Marks, 182 *U. S.*, 587.

Ever since the decision by this court in 1813 of the case of Mills vs. Duryee, 7 Cranch, 481, the rule has been settled that the judgment of a court of a sister state is conclusive upon the merits in the courts of every other state by virtue of Section 1, Article 4, of the Constitution of the United States, and Section 905 of the United States Revised Statutes.

2 *Black on Judg., Sec.'s* 853-8.
13 *Am. & Eng. Encyc. of L.* (*2nd Ed.*), 983.

The decree of a court of chancery is equally conclusive in the courts of a sister state.

Nations vs. Johnson, 24 *How.* (*U. S.*), 195.
2 *Black on Judg., Sec.* 858.

The judgment is conclusive evidence of a *debt* when made the basis of an action in the courts of a sister state.

McElmoyle vs. Cohen, 13 *Pet.*, 312.
Bank of Alabama vs. Dalton, 9 *How.* (*U. S.*), 528.
Elizabeth Sav. Inst. vs. Gerber, 34 *N. J. Eq.*, 130.
Gulick vs. Loder, 13 *N. J. L.*, 68.
Bank of U. S. vs. Merchants Bank, 7 *Gill.* (*Md.*), 415.
Duvall vs. Fearson, 18 *Md.*, 502.
Elliott vs. Ray, 3 *Blackf.* (*Ind.*), 384.
Napier vs. Gidiere, 1 *Spear's Eq.* (*S. C.*), 215; 40 *Am. Dec.*, 613.

In McElmoyle vs. Cohen, Mr. Justice Wayne, who rendered the opinion of this court, said:

> "Though a judgment obtained in the court of a state is not to be regarded in the courts of her sister states as a foreign judgment, or as merely *prima facie* evidence of a debt to sustain action upon the judgment, it is to be considered only distinguishable from a foreign judgment in this, that by the 1st section of the 4th article of the constitution, and by the act of May 26th, 1790, sec. 1 (section 905, U. S. Rev. Stat.), the judgment is a record, conclusive upon the merits, to which full faith and credit shall be given when authenticated as the act of Congress has prescribed. It must be obvious, when the constitution declared that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and provides that Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof, that the latter clause, as it relates to judgments, was intended to provide the means of giving to them the conclusiveness of judgments upon the merits, when it is sought to carry them into judgments by suits in the tribunals of another state. The authenticity of a judgment and its effect depend upon the law made in pursuance

> of the constitution; the faith and credit due to it as the judicial proceeding of a state, is given by the constitution, independently of all legislation. By the law of the 26th of May, 1790, *the judgment is made a debt of record,* not examinable upon its merits, but it does not carry with it into another state the efficacy of a judgment upon property or persons to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there, and can only be executed in the latter as its laws may permit. It must be conceded that the judgment of a state court cannot be enforced out of the state by an execution issued within it. This concession admits the conclusion, that under the 1st section of the 4th article of the constitution, judgments out of the state in which they are rendered, are only evidence in a sister state that the subject matter of the suit has become a *debt of record,* which cannot be avoided but by the plea of *nul tiel record.* * * * They (such judgments) are record evidence of a *debt,* or judgments of record, to be contested only in such way as judgments of record may be; and, consequently, are conclusive upon the defendant in every state, except for such causes as would be sufficient to set aside the judgment in the courts of the state in which it was rendered."

In Bank of Alabama vs. Dalton, Mr. Justice Catron, who rendered the opinion of this court, said:

> "The legislation of Congress amounts to this—that the judgment of another state shall be record evidence of the demand, and that the defendant, when sued on the judgment, cannot go behind it and controvert the contract, or other cause of action, on which the judgment is founded; *that it is evidence of an established demand, which, standing alone, is conclusive between the parties to it."*

The judgment or decree is conclusive, not only as to the parties, but also as to their privies.

> *Litchfield vs. Goodnow,* 123 *U. S.* 551.
> 2 *Black on Judg., Sec.* 549.
> 23 *Cyc.* 1253.

The judgment or decree is open to inquiry in a court

of a sister state as to the jurisdiction of the court which rendered it.

Christmas vs. Russell, 5 *Wall.* 290.
Old Wayne Life Assn. vs. McDonough, 204 *U. S.* 8.
Wetmore vs. Karrick, 205 *U. S.*, 141.

In determining whether the Michigan courts failed to give full faith and credit to the records and judicial proceedings of the Supreme Judicial Court in Equity for Suffolk County in accordance with section 1, article 4, of the Constitution of the United States, and section 905 U. S. Rev. Stat., the broad question is, therefore, whether that court had such jurisdiction that its decree is conclusive evidence of debt in this proceeding. The precise questions which we shall present for this court to consider and determine are: 1st, whether that court, having had jurisdiction in Fletcher's lifetime over the subject matter and the parties to the suit, and on his death the suit having been duly revived against the administrator with the will annexed of his estate in Massachusetts, had such jurisdiction that its decree is conclusive evidence of debt in this proceeding; and, 2nd, whether Fletcher's Michigan executors and the administrator with the will annexed of his estate in Massachusetts are in such privity that the decree is conclusive evidence of debt in this proceeding. If either of these propositions is answered in the affirmative by this court, then it necessarily follows that the Michigan courts failed to give full faith and credit to the decree of the Supreme Judicial Court in Equity for Suffolk County. For the purposes of this case, we shall treat the submission to arbitration, as it was treated by the Supreme Court of Michigan (R., p. 188), merely as a step in the proceedings in the suit in the Supreme Judicial Court in Equity for Suffolk County.

The Supreme Court of Michigan apparently misunderstood our position. We contended in that court, as here, 1st, that the decree is conclusive evidence of debt in this proceeding, irrespective of whether there was privity between the Michigan executors and the administrator with the will annexed, because of the jurisdiction that the Supreme Judicial Court in Equity for Suffolk County possessed in Fletcher's lifetime over the subject matter and the parties to the suit; and, 2nd, that the decree is conclusive evidence of debt in this proceeding, because

there was privity between the administrator with the will annexed and the Michigan executors. That court, however, in its opinion, stated our position as follows (R., p. 189):

> "Two principal propositions are asserted. One, that the lawful course and practice of the Massachusetts Court and the relation of the administrator with the will annexed to the court (as a party to the suit properly brought on the record), and to the estate of the decedent (by reason of his privity with the domiciliary executors and the estate) have the effect to make the judgment pronounced by that court conclusive and binding upon the estate of Mr. Fletcher wherever found and upon the domiciliary representatives."

The other proposition stated by that court was the one argued by our associate counsel. It will be noted that our first propositon was wholly ignored by that court, and a careful reading of its opinion will show this court that that proposition was given very little, if any, consideration by it, in fact none whatever, except in connection with our second proposition. As it misstated our position, and gave our first proposition no consideration except in connection with our second proposition, apparently through misunderstanding, it is not surprising that it fell into error. We call attention to this fact because it may aid this court in getting a better understanding of the precise questions involved.

The Supreme Judicial Court in Equity for Suffolk County, Massachusetts, having had jurisdiction in Fletcher's lifetime over the subject matter and the parties to the suit, and on his death the suit having been duly revived, the decree is conclusive evidence of debt in this proceeding.

The suit was commenced in the lifetime of Fletcher in the Supreme Judicial Court in Equity for Suffolk County, Massachusetts, a court of general equity jurisdiction (Sec. 1, chap. 159, Mass Rev. L. 1902); process was personally served upon him within the territorial jurisdiction of that court; he appeared in the cause and filed an answer; testimony was taken; the cause was referred to a master; and more testimony was taken; two reports by the master of the facts found by him were filed in that court; articles of submission were signed by Fletcher, in which it was provided that the death of any party thereto should not revoke the submission, but that the arbitration should continue, and that the legal representatives of the parties should be bound by the final award, and further, that the submission should be under rule of court, and should not operate as a discontinuance of the suit; an arbitrator was appointed by the court; the arbitrator heard the proofs and the arguments of counsel, and then filed his preliminary award, by which he found Fletcher liable to account, and determined the manner in which the extent of his liability should be ascertained; he then proceeded to determine the extent of Fletcher's liability, and Fletcher appeared personally before him:—*all in the lifetime of Fletcher.* All that remained to be done was to determine the extent of his liability. The proceedings had covered the period from 1874 to 1899, twenty-five years.

It may be that death—like charity—covers a multitude of sins, but it remains for the decision of this court to determine finally whether the death of Fletcher shall operate as a practical extinguishment of his legal liability under the circumstances which appear in this case. Can it be that the Supreme Judicial Court in Equity for Suffolk County did not possess jurisdiction, on his death being suggested of record, to revive the suit and

make a decree that would have the same force and effect with respect to his estate in Michigan as a decree made in his lifetime would have had? Did the plaintiff in that suit lose the fruits of twenty-five years of litigation? And that, too, at a time when the litigation was about to result in a final award and decree in his favor? Did the jurisdiction of that court rest upon such an uncertain foundation? We do not think so. Having possessed jurisdiction in the lifetime of Fletcher of the subject matter and the parties to the suit, and on his death the suit having been duly revived in strict conformity to the statutes of Massachusetts, the decree is as conclusive evidence of debt in this proceeding as a decree made in Fletcher's lifetime would have been.

The rule is universal that the death of a party to a suit in equity does not amount to a *determination* of the suit, but that its effect is merely to *suspend* the proceedings until new parties are brought before the court. When the suit is revived, the cause proceeds to its regular determination.

> 5 *Am. & Eng. Encyc. of Pl. & Pr.*, 790-1.
> *Story's Equity Pl. & Pr., Sec.* 354.
> *Clarke vs. Mathewson*, 12 *Pet.* (*U. S.*), 171.
> *Mellus vs. Thompson*, 1 *Cliff.* (*U. S.*), 129.
> *Hoxie vs. Carr*, 1 *Sumn.* (*U. S.*), 178.

In Story on Eq. Pl. & Pr., cited supra, it is said:

> "An abatement, in the sense of the common law, is an entire overthrow or destruction of the suit, so that it is quashed and ended. But in the sense of courts of equity, an abatement signifies only a present *suspension* of all proceedings in the suit, from the want of proper parties capable of proceeding therein. At the common law, a suit, when abated, is absolutely dead. But, in equity, a suit when abated, is (if such an expression be allowable) merely in a state of *suspended animation;* and it may be revived."

In Clarke vs. Mathewson, supra, Mr. Justice Story said:

> "The death of either party, pending the suit, does not, where the cause of action survives, amount to a determination of the suit. It might in suits at common law, upon the mere principles

of that law, have produced an abatement of the suit, which would have destroyed it. But in courts of equity, an abatement of the suit, by the death of a party, has always been held to have a very different effect; for such abatement amounts to a *mere suspension,* and not to a determination of the suit. It may again be put in motion by a bill of revivor, and the proceedings being revived, the cause proceeds to its regular determination as an *original* bill. *The bill of revivor is not the commencement of a new suit, but is the mere continuation of the old suit.*"

In Mellus vs. Thompson, supra, Mr. Justice Clifford said:

> "The abatement of a suit in equity by the death of a party, in cases where the cause of action survives, does not amount to an unconditional determination of the suit. Unlike the abatement of a suit at common law, the death of one of the parties to a bill in equity, before a final decree, only has the effect in general to *suspend* the proceeding in the suit, but does not operate to extinguish the right of further prosecution, provided the proper representatives of the deceased party seasonably appear and prosecute the same by bill of revivor."

In Hoxie vs. Carr, supra, Mr. Justice Story said:

> "The nature of an abatement in equity seems to have been misunderstood at the argument. It is not necessarily a destruction of the suit, like an abatement at law, where a judgment, *quod cassetur,* is entered. It is merely an interruption to the suit, *suspending* its progress, until the new parties are brought before the court."

It is thus clear that the Supreme Judicial Court in Equity for Suffolk County had power to revive the suit on Fletcher's death being suggested on the record. The suit was not abated by his death, in the strict sense of that term, but it caused a *mere suspension* of the proceedings. *The jurisdiction of the court continued, but its right to exercise that jurisdiction was suspended.*

In Sanford vs. Sanford, 28 Conn. 6, the court said:

> "A *suspension* of the jurisdiction of a court, in the sense in which the term is used by the defendant, is a solecism. Jurisdiction is either exhausted or retained. It can never be properly said to be in a state where it is suspended and can be revived. The *exercise* of it by the court possessing it may be and often is suspended, but it still continues to exist, and only awaits the determination of the court as to when and how it shall be called into action."

The power of the Supreme Judicial Court in Equity for Suffolk County to revive the suit is therefore unquestionable. How should it have exercised this power? It is our contention that the plaintiff had the right to revive the suit against Frank B. Cotton, administrator with the will annexed of Fletcher's estate in Massachusetts. Cotton had been appointed as such administrator by the Probate Court of Middlesex County, Massachusetts, and had duly qualified. The petition for his appointment as such administrator was filed by Frances M. Brown (R., p. 155). This fact has caused some criticism by the trial judge (R., p. 7), and by the Supreme Court of Michigan (R., p. 192), but, under the statutes of Massachusetts, Frank W. and Allan M. Fletcher, the executors appointed in Michigan, might have had themselves appointed executors in Massachusetts by appointing a resident agent to receive service of legal process.

Sections 10, 11 and 12, Chap. 136, Mass. Rev. L. 1902, provide for the probate of foreign wills in Massachusetts. Sec. 12 is as follows:

> "After allowing a will under the provisions of the two preceding sections, the Probate Court shall grant letters testamentary on such will or letters of administration with the will annexed, and shall proceed in the settlement of the estate which may be found in this commonwealth in the manner provided in Chap. 143 relative to such estates."

Sec. 6, Chap. 137, Mass. Rev. L. 1902, provides for the appointment of an administrator with the will annexed. It is as follows:

> "If no executor is named in a will, or if all the executors therein named are dead or incompetent or refuse to accept the trust, or if, *after being duly*

> *cited for the purpose, the executor neglects to accept the trust* or neglects for twenty days after the probate of the will to give bond according to law, the court shall commit administration of the estate, with the will annexed, to such person as would have been entitled thereto if the deceased had died intestate; but after the expiration of said twenty days, and before letters of administration with the will annexed have been granted, the court may grant letters testamentary to any person named as executor who gives the bond required by law."

Sec. 8, Chap. 139, Mass. Rev. L. 1902, provides for the appointment of resident agents. It is as follows:

> "An executor or administrator who is appointed in, but resides out of, this commonwealth shall not enter upon the duties of his trust nor be entitled to receive his letter of appointment until he shall, by a writing filed in the registry of probate for the county in which he is appointed, have appointed an agent residing in this commonwealth, and by such writing shall have agreed that the service of any legal process against him as such executor or administrator, or that the service of any such process against him in his individual capacity in any action founded upon or arising out of any of his acts or omissions as such executor or administrator shall, if made on said agent, have like effect as if made on himself personally within the commonwealth, and such service shall have such effect. Said writing and also the notice of appointment of such executor or administrator shall state the name and address of the agent. An executor or administrator who, after his appointment, removes from and resides without, the commonwealth shall so appoint a like agent."

The appointment of Cotton as administrator conformed in every particular to these statutes. Notice of the application for his appointment as administrator was served upon Frank W. and Allan M. Fletcher, the Michigan executors (R., pp. 155-6). The Michigan executors certainly have no right, either legal or otherwise, to complain of Cotton's appointment, inasmuch as they elected not to have themselves appointed. It seems to us, therefore, that the criticism of the Michigan courts as to the

mode of his appointment is wholly unwarranted. The administration of justice did not depend upon the mere caprice of the Michigan executors. Cotton having been duly appointed administrator with the will annexed of Fletcher's estate in Massachusetts, the plaintiff had the right to have the suit revived against him in the Supreme Judicial Court in Equity for Suffolk County. The revivor of suits in Massachusetts, on the death of a party, is regulated by statute.

Sec. 17, Chap. 171, Mass. Rev. L. 1902, is as follows:

> "If a party to a suit in equity dies and the cause by the rules of equity may be revived against or in favor of an executor, administrator, heir or devisee, or other person, such representative may, in lieu of proceedings to revive the same, appear or be summoned to prosecute or defend in like manner as in an action at law."

Sec. 5 is as follows:

> "If the sole plaintiff or defendant in a personal action, the cause of which survives, dies before the entry thereof or of an appeal from a judgment rendered therein, the action or appeal may be entered and his death suggested upon the record. After the entry of such action or appeal and of the suggestion of his death as aforesaid, his executor or administrator may, within such time as the court or trial justice allows, appear and prosecute or defend in the same manner as if the action had been commenced by or against him. If he does not voluntarily appear, the court or trial justice before whom the action is pending shall, upon motion of the surviving party, cite him to appear and prosecute or defend it."

Sec. 6 is as follows:

> "Such citation shall be returnable at such time as the court or trial justice may order and shall be served fourteen days, at least, before the return day; but it shall not issue after the expiration of two years from the time such executor or administrator has given bond, if he has given the notice of his appointment as required by law."

Sec. 7 is as follows:

> "If the executor or administrator does not appear on the return of the citation or within such further time as the court or trial justice allows, he shall be non-suited or defaulted and judgment rendered against him in like manner as if the action had been commenced by or against him in his said capacity, except that he shall not be personally liable for costs; but the estate of the deceased in his hands shall be liable for the costs, as well as for the debt or damages recovered."

It has been held by the Supreme Court of Massachusetts that these statutes do away with the necessity for a bill of revivor.

Cheney vs. Gleason, 125 *Mass.*, 174.
Parker vs. Simpson, 180 *Mass.*, 358.

The revivor of the suit against Cotton, as administrator with the will annexed, was in strict conformity to these statutes. Notice to appear and take upon themselves the defense of the suit was also personally served upon the Michigan executors in Michigan, which, at least, shows that no undue advantage was attempted to be taken of them, and that they were given every possible notice and opportunity to appear and defend the suit. After the suit was revived they were also given notice of the proceedings before the arbitrator (R., p. 109), but they ignored all notices of the proceedings for the administration of Fletcher's estate in Massachusetts and of the proceedings in the suit in the Supreme Judicial Court in Equity for Suffolk County. The administrator with the will annexed did appear in the suit (R., p. 151), and also before the arbitrator (R., p. 109).

The suit having been duly revived against Cotton, the administrator with the will annexed, the court had the right to proceed in the cause and make a decree against him, as such administrator, which decree is conclusive upon the merits in Massachusetts. This was not questioned by counsel for the defendant estate in the Michigan courts, and the Circuit Court of Wayne County (R., p. 6) and the Supreme Court of Michigan (R., p. 188) each recognized the validity and conclusiveness of the decree in Massachusetts, but they held that the decree, while valid as to Fletcher's estate in Massachusetts, is not evidence of debt in this proceeding against his estate in Michigan. That is the dividing line. It is

our contention that the decree is conclusive evidence of debt in this proceeding because of its conclusiveness in Massachusetts.

While the right of the Supreme Judicial Court in Equity for Suffolk County to proceed in the suit was *suspended* by Fletcher's death, the court was not thereby *divested* of jurisdiction. It retained the jurisdiction possessed by it in the lifetime of Fletcher until the cause was finally determined.

In 2 Black on Judg., Sec. 912, it is said:

> "Where a court has acquired full jurisdiction of a cause, it retains it until the cause is finally determined. *The exercise of the jurisdiction may be suspended, but the jurisdiction itself is never suspended.* When, therefore, a court which still retains jurisdiction, but has suspended the exercise of it, assumes again to exercise its jurisdiction, its action is within its power and cannot be collaterally impeached."

In Freeman on Judg., Sec. 142, it is said:

> "Jurisdiction over a party being obtained, continues until judgment, and he must, therefore, take notice of all the proceedings until that time."

In Sanford vs. Sanford, 28 Conn., 6, it is said:

> "Jurisdiction of a case consists in the right to hear and determine it, and embraces not only its merits, but the proceedings in it which are necessary to enable the court possessing such jurisdiction to bring it to a final determination—that is, to such a determination that the court cannot rightfully or legally proceed further in the case. Obviously, no such end is attained so long as the proceedings in the case which have taken place remain subject to the renewed or continued or further action of the court, or while it retains the right to revoke, annul, or alter in any manner its previous action."

In Evans vs. Black, 5 Ark., 429, it is said:

> "Where a court has once jurisdiction over a subject matter and the parties, it has a right to

decide every question that arises in the cause; and whether the decision be correct or not, its judgment, until reversed, is regarded as binding in every court."

In Quarl vs. Abbett, 102 Ind., 239-240, it is said:

"The authority to hear and determine a cause is jurisdiction to try and decide all of the questions involved in the controversy. This principle is an ancient one, and even in the time when the contest between the chancery courts and the common law courts was hot and angry it was recognized and enforced. Where the jurisdiction of the court once attaches it extends over the whole case, and the court will determine all questions necessary to a full adjudication of the controversy."

In Gray vs. Bowles, 74 Mo., 419, it is said:

"When there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction, and an erroneous decision of any of these other questions could not impair the validity and binding force of the judgment when brought in collaterally."

In Nations vs. Johnson, 24 How. (U. S.), 202, this court said:

"All of the equities of the case are, therefore, with the present defendants. Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, as a general rule, is regarded as binding in every other court."

See also:

Smith vs. Engle, 44 *Iowa*, 265.
Laing vs. Rigney, 160 *U. S.*, 531.
Fitzsimmons vs. Johnson, 90 *Tenn.*, 416.
Field vs. Judge, 124 *Mich.*, 68.

The court having possessed jurisdiction of the cause until it was finally determined, its exercise of that jurisdiction cannot be questioned in a collateral proceeding

like the one at bar. There is a marked distinction between the *jurisdiction* of a court and its *exercise of that jurisdiction*. If it has no jurisdiction, any judgment rendered by it is absolutely void, and may be attacked in a collateral proceeding. If it has jurisdiction, but exercises it wrongfully, its judgment may be reversed on appeal, but it cannot be questioned in a collateral proceeding.

In 17 Am. & Eng. Encyc. of L. (2nd Ed.), 1042, it is said:

> "*Jurisdiction* should, therefore, be distinguished from the *exercise of jurisdiction*. The authority to decide a cause at all, and not the decision rendered therein, is what makes up jurisdiction. When there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction."

In Paine vs. Mooreland, 15 O., 435, it is said:

> "The distinction is between a lack of power or want of jurisdiction in the court, and a wrongful or defective execution of the power. In the first instance all acts of a court not having jurisdiction or power are void, in the latter voidable only. A court, then, may act (1) without power or jurisdiction; (2) having power or jurisdiction, may exercise it wrongfully; or, (3) irregularly. In the first instance, the act or judgment of the court is wholly void, and is as though it had not been done. The second is wrong, and must be reversed upon error. The third is irregular, and must be corrected by motion. The latter is where the power is rightfully exercised, but in an irregular way. Hence, there is a vast distinction between a defect of power, a wrongful exercise of power, and an irregular exercise of power."

In Chase vs. Christianson, 41 Cal., 255, it is said:

> "Here, then, was jurisdiction of the subject matter and of the person, and, these conditions being conceded, the decision of all other questions arising in the case is but the exercise of that jurisdiction, and an erroneous decision of any of these other questions could not impair the validity and binding

force of the judgment when brought in question collaterally."

See also:

Laing vs. Rigney, 160 *U. S.*, 531.
Babb vs. Bruere, 23 *Mo. App.*, 606.
Hagerman vs. Sutton, 91 *Mo.*, 519.

Therefore, the court having possessed jurisdiction of the subject matter and the parties to the suit in the lifetime of Fletcher, and his death not having abated the suit, nor divested the court of jurisdiction, and the exercise of its jurisdiction having been merely suspended thereby, and the suit having been properly revived against the administrator with the will annexed of his estate, and the court having retained the jurisdiction that it possessed in Fletcher's lifetime until the cause was finally determined, the decree against such administrator is unquestionably valid, and it is difficult to understand why it does not logically follow that it is conclusive evidence of debt in this proceeding against his estate in Michigan.

If the decree had been made in the lifetime of Fletcher, there can be no doubt that it would be conclusive evidence of debt in a proceeding like the one at bar against his estate in Michigan. As the court retained the jurisdiction possessed by it in his lifetime until the final determination of the suit, why has not the decree made by it the same force and effect as evidence of debt in this proceeding as a decree made in his lifetime would have had? The only effect of his death was to suspend the right of the court to proceed in the cause. When the suit was revived against the administrator with the will annexed, the right of the court to proceed was revived. The revivor of the suit was not the *commencement* of a new suit, but a mere *continuation* of the old suit.

Even if the suit had not been revived after Fletcher's death the decree would be merely voidable, and not void, nor subject to attack in a collateral proceeding like the case at bar. While a court ought to cease the exercise of its jurisdiction over a party on his death, its failure to do so can only be corrected in a direct proceeding. The court having possessed jurisdiction in the lifetime of the party, and having retained such jurisdiction until the final determination of the suit, its exercise of that jurisdiction, *even after the death of a party*, is not subject to collateral attack.

2 Black on Judg., Sec. 200.
Freeman on Judg., Secs. 140-153.
17 *Am. & Eng. Encyc. of L.* (*2nd Ed.*), 1070.
New Orleans vs. Gaines, Admr., 138 *U. S.* 612.
Reid vs. Holmes, 127 *Mass.* 326.
Collins vs. Mitchell, 5 *Fla.*, 364.
Neale vs. Utz, 75 *Va.*, 480.
Yaple vs. Titus, 41 *Pa. St.* 195.
Carr vs. Townsend's Ex'rs., 63 *Pa. St.*, 202.
Swasey vs. Antram, 24 *O. St.*, 87.
Claflin Ex'r vs. Dunne, 129 *Ill.*, 241.
Mitchell vs. Schoonover, 16 *Ore.*, 211.
Hayes vs. Shaw, 20 *Minn.* 405.
Stocking vs. Hanson, 22 *Minn.*, 542.
Watt vs. Brookover, 29 *Am. St., Rep.*, 816n.
Webber vs. Stanton, 1 *Mich. N. P.*, 97.

In Black on Judg., cited supra, it is said:

> "The great preponderance of authority is to the effect that, where the court has acquired jurisdiction of the *subject matter and the persons*, during the lifetime of a party, a judgment rendered against him *after his death* is, although erroneous and liable to be set aside, not void or open to collateral attack."

In Freeman on Judg., Sec. 153, it is said:

> "Judgments for or against deceased persons are not generally regarded as void, on that account. Such judgments have sometimes been upheld in collateral proceedings, on the ground that their rendition necessarily implied that the parties were then living; and that this implied finding in support of judgments ought not to be allowed to be impeached by evidence not contained in the record. * * * Where the parties have not estopped themselves by neglecting to make proper pleas, the judgment may be shielded by refusing to permit any collateral attack for the purpose of showing the decease of one of the parties, *still cases arise where the death of a party appears upon the record. Even in such cases the judgment is simply erroneous, but not void. This is because the court, having obtained jurisdiction over the party in his lifetime, is thereby empowered to proceed with the action to final judgment*, and while the court ought to cease to exercise its juris-

diction over a party when he dies, its failure to do so is an error to be corrected on appeal if the fact of the death appears upon the record, or by writ of error *coram nobis* if the fact must be shown *aliunde*. That a judgment against a person dead at its rendition, is valid until reversed or set aside by some competent judicial authority, and that it cannot be collaterally attacked, is established by a larger preponderance of the authorities than can be brought forward to shield a judgment against a married woman from collateral assault and overthrow."

In Reid vs. Holmes, supra, it is said:

"The court at the time of the bringing of th former action, had jurisdiction of the *subject matter and of the parties*, and might, after the death of the defendant, have rendered judgment against him as of a previous term. Or the judgment actually entered might, on motion of the plaintiff, have been amended so as to stand as a judgment *nunc pro tunc*. * * * Even if the judgment might have been reversed by writ of error in fact, * * * it would seem that neither party could collaterally dispute the validity of the judgment."

In Mitchell vs. Schoonover, supra, it is said:

"It is argued that this judgment is void, and for that reason it ought to have been set aside. But the authorities do not sustain this position. It must be remembered that the judgment itself is not before us for the reason that the appellant took no appeal from it. We are not, therefore, required or permitted to say whether it is reversible for error or not. * * * The decided weight of authority seems to be to the effect that if a court of general jurisdiction, or a court which has acquired *full jurisdiction over the cause and over the parties*, renders a judgment for or against a party after the death of such party, the judgment is not for that reason void. It may be erroneous, but until reversed by some appropriate proceeding it is valid."

In Hayes vs. Shaw, supra, it is said:

> "The court having acquired jurisdiction of the parties, possesses the power to proceed to the ought to cease to exercise its jurisdiction over a party at his death, the neglect to do so is an error to be corrected by some proceeding in the action in which the error occurs, and the judgment, though erroneous is not on that account to be attacked in a collateral action. In other words, the judgment is voidable, when properly assailed, but not void."

In the note to Watt vs. Brookover, supra, it is said:

> "The great weight of American authority sustains the proposition that where a court has obtained jurisdiction of the *parties and of the subject matter* during the lifetime of the parties to the suit, a judgment rendered for or against one of them *after his death*, although erroneous and liable to be set aside by proper *direct* proceeding, is simply voidable, and not void, nor subject to collateral attack," citing many authorities.

As we have stated, if the decree had been made in the lifetime of Fletcher, it would have been conclusive evidence of debt in this proceeding against his estate in Michigan. If it had been made against him after his death, without the suit having been revived, it likewise would have been conclusive evidence of debt in this proceeding against his estate, because its validity and conclusiveness could not have been attacked in a collateral proceeding. Therefore, the suit having been properly revived, it seems to us that it is absurd to say that the decree has not as much force and effect as evidence of debt in this proceeding as it would have had if the suit had not been revived. While the decree is not entitled to any more faith and credit in a collateral proceeding like the one at bar than a decree made without the suit having been revived would have been, it certainly is entitled to as much faith and credit. *Its force and effect is not less because the proceedings were regular than they would have been if the proceedings had been irregular.*

By his final award, the arbitrator found that the "*estate of George N. Fletcher*" was indebted to Albert W. Brown, in his representative capacities, in certain stated sums (R., p. 110). This award was regularly confirmed

by the final decree of the Supreme Judicial Court in Equity for Suffolk County (R., p. 148). Under all the authorities, this finding cannot be questioned in a collateral proceeding. Accord having been found liable by the preliminary award filed in his lifetime, and nothing remaining to be done but to determine the amount of his liability, the court could have entered its decree *nunc pro tunc* as of a date in his lifetime.

Emery vs. Parrott, 107 *Mass.*, 95.
Gunderman vs. Gunnison, 39 *Mich.*, 313.

In Emery vs. Parrott, supra, the court said (p. 104):

> "Head having died since the case was fully argued and an interlocutory decree made upon the merits and the case referred to a master to state the account, and Parrott, his surviving partner, having been fully heard before the master, and before the court on exceptions to his report, a final decree for the plaintiffs should be entered *nunc pro tunc* as of the date of that interlocutory decree."

The decree made by the court could have been vacated, and entered *nunc pro tunc*.

Stickney vs. Davis, 17 *Pick.*, 169.
Reid vs. Holmes, 127 *Mass.*, 328.

Vacating the decree and entering it *nunc pro tunc* would have been a mere matter of practice. Therefore, the decree cannot be attacked in a collateral proceeding like the one at bar for the failure to enter it *nunc pro tunc*. It seems to us that upon principle there can be no doubt that the decree cannot be attacked in this proceeding, and that it is conclusive evidence of debt.

The Supreme Court of Michigan, in its opinion, said (R., p. 191):

> "It is said that 'While (quoting from our brief) a court ought to cease the exercise of its jurisdiction over a party on his death, its failure to do so can only be corrected in a direct proceeding. The court having possessed jurisdiction in the lifetime of the party, and having retained such jurisdiction until the final determination of the suit, its exercise of that jurisdiction, even after the

death of a party, is not subject to collateral attack.'

"The record answers the argument. The suit abated, was revived, and proceeded thereafter abated, was revived, and proceeded thereafter against the legal representative of the deceased. The decree is not in *form* against the deceased; it is in *form* against his representatives. So, too, the argument that the final decree might have been entered *nunc pro tunc* a day prior to the death of Mr. Fletcher, and being so entered could not be collaterally attacked, is, in the same way, answered. It is not intended, however, to admit that in the case supposed the question mooted could not be raised and determined."

It is true the decree is not in *form* against Fletcher, and that it was not entered *nunc pro tunc*, but those facts are not an answer to our contention. The *mere form* of the decree certainly cannot determine its efficacy as evidence of debt in this proceeding. It is the *substance* of the decree, not merely its *form*, to which we must look to determine the faith and credit which must be given to it in this proceeding. A judgment in form against a corporation binds its stockholders in suits to enforce their liability as such; a judgment in form against a trustee binds its *cestui que trust;* a judgment in form against a guardian binds his ward; and thus examples might be multiplied. If the decree had been in form against Fletcher, it would have been irregular, but nevertheless, as we have shown, it would have been valid and conclusive evidence of debt in a collateral proceeding like that at bar. Instead of having been irregularly rendered against Fletcher, the decree was regularly rendered against the administrator with the will annexed. The *debt of record* established by the decree was that of Fletcher, who was a party to the proceedings for its establishment, at least up to the time of his death. While he died before the debt was finally established by the decree, and was succeeded by the administrator with the will annexed, *that did not change the fact that the debt was his.* Therefore, whether the debt was established in form against him, or in form against the administrator with the will annexed, is unimportant.

Counsel for the defendant estate and the Michigan courts have assumed that it is beyond question that the Supreme Judicial Court in Equity for Suffolk County completely lost jurisdiction of the *person* of Fletcher by

his death, but a careful consideration of the question will, we are convinced, lead to the conclusion that they are right only in a limited sense, that is, while that court after his death obviously could not enforce its orders and decrees by process against his person, as by imprisonment for contempt, etc., it still had such jurisdiction *in personam* (if we may call it such), acquired in his lifetime, and not divested by his death, that it had power to proceed to final decree against him. To say that jurisdiction of the person is lost by the death of a party is a solecism. As we have shown, jurisdiction is not lost by the death of a party, *but only the right to exercise it is suspended thereby.* Jurisdiction, once acquired, continues until the final determination of the suit. The authorities cited by us (supra, p. 28) certainly hold this, if they hold anything. There is no other possible ground upon which the judgments in those cases can be upheld. If the courts in those cases completely lost jurisdiction *in personam* by the death of the defendants, what authority had they to proceed to final judgments against them? If jurisdiction had been completely lost by the death of the defendants, the judgments would have been absolutely void, not merely voidable. We insist, it is only because they did not lose jurisdiction *in personam* by the death of the defendants that they had authority to proceed to final judgments against them. Their right to exercise their jurisdiction was suspended by the death of the defendants, but their jurisdiction *in personam* was not thereby divested.

The revivor of the suit against Cotton, as administrator, was simply a *step* in the suit, which, as we have shown, was not essential to the validity of the decree, but was only necessary to the regularity of the proceedings. It neither adds to nor lessens the efficacy of the decree as evidence of debt in the case at bar, which is a collateral proceeding. As we have shown, the revivor of the suit was not the *commencement* of a new suit, but merely the *continuation* of the old suit. It was simply the exercise of jurisdiction previously acquired. The efficacy of a decree as evidence in a collateral proceeding is determined by the jurisdiction of the court which rendered it, not by that court's exercise of its jurisdiction. This court, in determining whether full faith and credit has been given to the judgment or decree of a state court in the courts of a sister state, passes upon the jurisdiction of the court which rendered it, not on its exercise of that jurisdiction. In effect, the decree is that Fletcher, succeeded

by Cotton, administrator, simply in order that the court might regularly exercise its jurisdiction, was indebted to the plaintiff in that suit. It is thus clear, we submit, that our contention is not answered, as the Supreme Court of Michigan held, by the fact that the decree is in *form* against Fletcher's legal representative.

The Supreme Court of Michigan, in its opinion, said (R., pp. 191-2):

> "If Mr. Fletcher had no estate in Massachusetts, no judgment could have been pronounced there which would bind the executors or the estate, unless the executors had applied and had been admitted to conduct the case. Because, whatever the rule as to survival of equity causes, such causes cannot in fact survive the death of a party so far as the rights of that party are concerned except by the action of someone with legal authority to represent him. If Mr. Fletcher had left no estate in Massachusetts, there would have been no person or no thing connected with his estate within the jurisdiction of the court."

That court has obviously overlooked the principle of the cases cited by us (supra, p. 28). Those cases hold that where a court has once become possessed of jurisdiction over the subject matter and the parties to the suit, it may proceed to final judgment, notwithstanding the death of a party, which judgment will be valid and conclusive in a collateral proceeding. The Supreme Judicial Court in Equity for Suffolk County had the right to proceed to final decree, even if Fletcher had left no estate in Massachusetts of which an administrator could have been appointed, because it had acquired jurisdiction in his lifetime over the subject matter and the parties to the suit. Its right to proceed to final decree was not dependent on his leaving estate in Massachusetts.

The Supreme Court of Michigan further said (R., p. 197):

> "Jurisdiction of the *person* of Mr. Fletcher was lost when he died. There was then no judgment and, as has been already said, there was no person within the territorial jurisdiction of the court upon whom the determination of the court could be made binding; there was no person, either, in that jurisdiction, whose action, or whose office, made a revival of the suit possible."

It is only fair to say that the court then had under consideration the effect of the articles of submission upon the right of the Supreme Judicial Court in Equity for Suffolk County to proceed to a decree against the Michigan executors, rather than the right to revive the suit against the administrator with the will annexed and to proceed to a decree against him; otherwise, the statements quoted might appear reckless, because certain it is that it was proper to revive the suit against the administrator with the will annexed, and certain it is that the court then had the right to proceed to a decree against him, and certain it is that the decree is binding upon him. As to whether the court lost jurisdiction of the person of Fletcher when he died, we have made it clear, we submit, that it lost jurisdiction of his person only in a limited sense, that is, his death simply took away its power to enforce its orders and decrees by process against his person, but did not take away its jurisdiction *in personam* to proceed to a final decree.

In the research that we have made,—and we have examined the question very carefully,—we have found only one case like the one at bar in every essential feature. While the principles applicable to the case at bar have many times been recognized, as we have shown, their application to the facts of a case like the one at bar has been judicially considered in only one case, so far as we have been able to find.

In Creighton vs. Murphy, 8 Nebr., 349, suit was commenced against Creighton in Iowa and process was personally served upon him there. He appeared and filed an answer. Shortly thereafter he died in Nebraska, being at the time of his death a resident of that state, and an administrator of his estate was appointed there. This administrator caused himself to be appointed administrator in Iowa and the suit was revived against him. He appeared and objected to the jurisdiction of the court, which sustained its own jurisdiction and rendered final judgment against him. An action was brought against him in Nebraska upon this judgment. The Nebraska Supreme Court, in affirming a judgment against him, said:

> "Whatever the rule may be as to judgments recovered against ancillary administrators upon claims filed *after* the death of the intestate, it cannot affect this case. Here an action was commenced against Edward Creighton in his lifetime,

and personal service was had on him, and he appeared and filed an answer to the petition, denying the facts stated herein. He died before the trial, but the cause of action survived. Had the court not authority, upon the appointment of an administrator and the revivor of the action, to proceed with the case and render judgment? We think it had. *The court had acquired jurisdiction and the death of the defendant did not oust it of that jurisdiction.* The court, therefore, had authority to revive the action against the administrator and to hear and determine the rights of the parties, and such judgment is conclusive as to the matters in issue. To require a plaintiff who has established his claim after a tedious and expensive litigation in Iowa to go through the same process in this state, would impose a burden upon him not required by the law."

The Supreme Court of Michigan points out, in its opinion (R., pp. 192-3), that in Creighton vs. Murphy, supra, it was not claimed by the answer filed in the lower court in Nebraska that the judgment rendered in Iowa was not binding upon Creighton's estate in Nebraska, but that court was compelled to admit that the question was considered and directly passed upon by the Supreme Court of Nebraska. The court quotes (R., p. 193) from the opinion in that case part of the language above quoted by us, but whether with approval or disapproval it fails to say. That case so clearly and unqualifiedly supports our contention that it seems to us the court should specifically either have approved or disapproved the doctrine there laid down, and not have allowed its disapproval to rest in inference. We venture the suggestion that its failure to specifically disapprove of the doctrine there laid down was because it was unable to give any good reason for such disapproval.

In that case, as in the case at bar, the suit was commenced in the lifetime of the defendant, and process was personally served upon him within the territorial jurisdiction of the court, and the judgment was held conclusive when presented as a claim against the estate of the deceased defendant in Nebraska, why? Because, "the court (quoting from the opinion) had acquired jurisdiction and the death of the defendant did not oust it of that jurisdiction." In the cases cited by us (supra, p. 28),

why were the judgments upheld? "Because (quoting from Freeman on Judg., Sec. 153) the court, having obtained jurisdiction over the party in his lifetime, is (was) thereby empowered to proceed with the action to final judgment." It is thus clear that the decision in Creighton vs. Murphy, supra, although unique, rests upon well established legal principles.

In Nations vs. Johnson, 24 How. (U. S.), 195, also cited supra, suit was commenced in a chancery court of Mississippi to recover certain slaves and for their hire for a specified time. The defendants, who at that time resided in Mississippi, appeared in the suit and filed an answer and prosecuted their defense for three years, when the court dismissed the bill. Shortly before the bill was dismissed, they removed from Mississippi to Texas, and after its dismissal, their attorney withdrew his appearance in the suit. The complainant, however, removed the case to the Supreme Court of Mississippi by writ of error, which court reversed the decree, and entered a decree in her favor, and remanded the case to the subordinate court to take an account. The chancery court then entered a decree in favor of the complainant. The defendants took no part in the proceedings after the dismissal of the bill, but notice by publication was given, under a Mississippi statute, of the removal of the case to the Supreme Court of that state. The complainant then commenced a suit, based upon the decree of the Mississippi court, against the defendants in the Federal court for the district of Texas. The defendants claimed that the Mississippi court lost jurisdiction over them by the dismissal of the bill after their removal to Texas, and that it did not have jurisdiction to make the decree against them. This court held that the Mississippi court, having once possessed jurisdiction over the subject matter and the parties, had authority to make the decree notwithstanding their removal from Mississippi, and that this decree was conclusive upon them in the suit in Texas.

Mr. Justice Clifford, who delivered the opinion of this court, said:

> "Had the decree, therefore, been rendered in the subordinate court before the appeal, the right of the plaintiffs below to recover in this suit would have been beyond question, unless there in some other error in the record. *Courts of general jurisdiction are presumed to act by right, and not by*

> *wrong,* unless it clearly appears that they have transcended their powers."

In the case at bar, if the decree had been rendered in the lifetime of Fletcher, the right of the plaintiff in error to recover in this suit would be beyond question. As has been said, the Supreme Judicial Court in Equity for Suffolk County is a court of general equity jurisdiction, and is therefore presumed to act by right, and not by wrong.

Mr. Justice Clifford further said:

> "Personal service was made upon the defendants in this case by due process of law in the court of *original jurisdiction,* and the question here is, whether a party duly served with notice in a subordinate court, after he has appeared and answered to the suit and secured an erroneous judgment in his favor, may voluntarily absent himself from the jurisdiction of the appellate tribunal, so as to render it impossible to give him personal notice of an appeal, and still have a right to complain that notice was served by publication, pursuant to the law of the jurisdiction from which he has thus voluntarily withdrawn. We think not. To admit the proposition, would be to deprive the other party of all means of removing the cause to the appellate tribunal, and would enable a party, who knew he had wrongfully prevailed in the court below, to secure the fruits of an erroneous judgment, by defeating the jurisdiction of the appellate court. Actual notice ought to be given in all cases where it is practicable, even in appellate tribunals; but wherever personal service has been rendered impossible by the removal of the appellee or defendant in error from the jurisdiction, service by publication is sufficient to give the appellate tribunal jurisdiction of the subject and the person, *provided it appears in the record that personal notice was given in the subordinate court, and that the party there appeared, and litigated the merits of the controversy.*"

It will be noted that the determining facts were the personal service upon the defendants by due process of law in the court of *original jurisdiction* and their appearance and defense of the suit therein. In the case at bar, there was personal service upon Fletcher within the ter-

ritorial jurisdiction of the Supreme Judicial Court in Equity for Suffolk County and he appeared and litigated the suit for twenty-five years. In that case it was held that the defendants could not, by removing from the jurisdiction, take away the right of the appellate court to review the case, although personal service could not be made upon them. The right of the appellate court to proceed was suspended until notice by publication was given under the statute, but, after it was given, the court had the right to proceed against them, *because of the jurisdiction it acquired by personal service upon them and their appearance and defense of the suit.* In that case, their removal from the jurisdiction was shortly before the bill was dismissed and after its dismissal their attorney withdrew his appearance. In other words, they withdrew from the litigation at a time when they were successful. In the case at bar, when Fletcher died, the arbitrator by his preliminary award had found him liable to account, and was about to determine the amount of his liability. In other words, his death occurred at a time when he was unsuccessful in the litigation. It seems to us, therefore, that there is stronger reason in the case at bar for holding that the Supreme Judicial Court in Equity for Suffolk County had the right to proceed than there was for holding that the Mississippi court had the right to proceed. While the right of the court to proceed was suspended, not divested, by Fletcher's death, upon the revival of the suit against the administrator with the will annexed under the Massachusetts statute, it had the right to proceed to final decree. Personal service could not be made upon Fletcher's Michigan executors, but personal notice was given them of the proceedings for the appointment of the administrator with the will annexed and also to appear and defend the suit. They could have had themselves appointed executors in Massachusetts and then have appeared and defended the suit. Every possible notice and opportunity to appear and defend was given them as was given the defendants in Nations vs. Johnson. As the defendants in that case could not take away the right of the Mississippi court to proceed by refusing to take further part in the proceedings, it logically follows that the right of the Supreme Judicial Court in Equity for Suffolk County was not taken away by the refusal of the Michigan executors to have themselves appointed executors in Massachusetts and to appear and defend the suit.

Mr. Justice Clifford further said:

> "There is a distinction between a writ of error and the original suit. According to the practice in this court, *it is rather a continuation of the original litigation than the commencement of a new action.*"

In the case at bar, we have shown that the revival of the suit in the Supreme Judicial Court in Equity for Suffolk County was not the commencement of a new suit, but merely a continuation of the original litigation.

Mr. Justice Clifford further said:

> "No rule can be a sound one which, by its legitimate operation, will deprive a party of his right to have his case submitted to the appellate court; and where, as in this case, personal service was impossible in the appellate court, through the act of the defendant in error, it must be held that publication, according to the law of the jurisdiction, is constructive notice to the party, *provided the record shows that process was duly served in the subordinate court, and that the party appeared and litigated the merits.*"

Can any rule be a sound one, which, under the circumstances of the case at bar, would deprive a party of his right to effectually revive a suit on the death of his adversary? While personal service was impossible upon the Michigan executors upon the revival of the suit, personal notice and notice by publication was given according to the law of the jurisdiction of the proceedings for the appointment of the administrator with the will annexed and to appear and defend the suit.

Mr. Justice Clifford further said:

> "Common justice requires that a party, in cases of this description, should have some mode of giving notice to his adversary; and where, as in this case, *the record shows that the defendant appeared in the subordinate court, and litigated the merits there to final judgment, it cannot be admitted that he can defeat an appeal by removing from the jurisdiction*, so as to render a personal service of the citation impossible. On that state of facts, service by publication, according to the law of the jurisdiction and the practice of the court, we

think, is free from objection, and is amply sufficient to support the judgment of the appellate court."

Does not common justice require that a party in cases like the one at bar should have some mode of effectually reviving the suit on the death of his adversary? In the case at bar, as in that case, the defendant appeared and litigated the merits. Can it be that his death deprived the court of the power to render a final decree against him? Should it not rather be said that the revival of the suit, according to the law of the jurisdiction and the practice of the court, was free from objection, and amply sufficient to support the decree?

In that case, the Mississippi court could not have enforced its decree by process against the *persons* of the defendants. Their removal as effectually took away its power to enforce its decree by process against their persons as would their death. Nevertheless, it was held that, after notice by publication was given, the Supreme Court of Mississippi had the right to review the case on writ of error and to render a decree against them. As their removal did not take away from the court the right to proceed to final decree against them, it logically follows, we submit, that their death would not have taken away that right. Whether they died, or whether they removed from the jurisdiction, the court could not enforce its decree by process against their persons. The effect of their death upon the right of the court to proceed to final decree would have been the same as was the effect of their removal. This answers the distinction which may be suggested that their removal was their voluntary act while their death would have been the act of God. Such a difference in cause would not have changed the effect. In either case, the right of the court to proceed would simply have been suspended, not divested. It seems to us, therefore, that the principle of Nations vs. Johnson is applicable to the case at bar, and that, as the decree in that case was held to be effective, not only against the property of the defendants in Mississippi, but also as conclusive evidence in Texas, so the decree in the case at bar ought to be held effective, not only against Fletcher's estate in Massachusetts, but also as conclusive evidence in this proceeding.

The jurisdiction of the Supreme Judicial Court in Equity for Suffolk County to render the decree sprung,

not from the revival of the suit against the administrator with the will annexed, but from the service of its process upon Fletcher within its territorial jurisdiction and his appearance and defense of the suit. As the efficacy of the decree as evidence in the case of Nations vs. Johnson was determined, not by the right to proceed acquired by the publication of notice under the Mississippi statute, but by the jurisdiction acquired by the service of process upon the defendants and their appearance and defense of the suit, it logically follows, we submit, that the efficacy as evidence of the decree in the case at bar must be determined, not by the right to exercise jurisdiction acquired by the revival of the suit against the administrator with the will annexed, but by the jurisdiction acquired by the service of process upon Fletcher and his appearance and defense of the suit. In the case at bar the revival of the suit, as in that case the publication of the notice, was a mere continuation of the original litigation. As the efficacy of the decree as evidence in that case was not changed by the publication of the notice, it logically follows, we submit, that the efficacy as evidence of the decree in the case at bar was not changed by the revival of the suit.

In Fitzsimmons vs. Johnson, 90 Tenn., 416, a resident of Ohio died testate, and nominated as executors of his will two residents of Tennessee, who duly qualified as such in Ohio. They administered the estate and distributed it in accordance with what they supposed to be the law of Ohio, and then filed their final account in the Ohio probate court, which approved the account and discharged them. Twenty-two years later an appeal was taken from the order approving the account and discharging the executors, notice thereof being given by publication under an Ohio statute, and the order of the probate court was set aside and a large judgment rendered against one of the executors, the other having died in the meantime. It seems that a mistake had been made as to the Ohio law which governed the distribution of the estate. The surviving executor, who, as has been said, lived in Tennessee, ignored the notice by publication and did not appear in the Ohio appellate court. This judgment was then made the basis of an action against the surviving executor in Tennessee. The Supreme Court of Tennessee held, upon the authority of Nations vs. Johnson, supra, that the judgment was conclusive upon the executor in the action in Tennessee, because the Ohio court having acquired jurisdiction over the parties and

the subject matter, and the appeal being only the continuation of the litigation, notice by publication was sufficient.

See also:

Laing vs. Rigney, 160 *U. S.* 531.
Field vs. Judge, 124 *Mich.*, 68.

As has been said, the revivor of the suit in the Supreme Judicial Court in Equity for Suffolk County was only a *step* in the proceedings. This necessarily follows from the fact that the death of Fletcher did not oust that court of jurisdiction and that the revival of the suit was only necessary to the regularity of the proceedings. As the revival of the suit was only a step in the proceedings, it logically follows, we submit, upon the principle established in the cases just discussed, that personal service upon the Michigan executors was unnecessary in order to bind them as privies to Fletcher. In those cases some notice was held to be necessary, but it was held that personal notice was not essential and that constructive notice was sufficient. The revival of the suit against the administrator with the will annexed and the procedings thereafter in the case at bar are analogous to the proceedings in those cases after the right of the courts to proceed had been suspended or stayed. As in those cases constructive notice gave the court the right to proceed, so in the case at bar the revivor of the suit gave the court the right to proceed. The principle to be deduced from those cases is that, where a court of competent jurisdiction has become possessed of jurisdiction over the subject matter and the parties, and for some cause its right to exercise its jurisdiction is stayed or suspended, constructive notice is sufficient to give it the right to proceed in the exercise of its jurisdiction to render a personal judgment or decree. As the death of Fletcher merely suspended the right of the court to proceed, it logically follows that the revivor of the suit, which was analogous to the giving of constructive notice in those cases, gave the court the right to proceed in the exercise of its jurisdiction to render a personal decree.

In Mellus vs. Thompson, 1 Cliff. (U. S.), 125, referred to by the Supreme Court of Michigan in support of its conclusion that it is unimportant that the suit in the Supreme Judicial Court in Equity for Suffolk County was pending at the time of Fletcher's death (R., pp. 192-3), suit was begun in the Federal Court for the

District of Massachusetts in the lifetime of the defendant. Subsequently the defendant died, a citizen and resident of California, and executors were appointed by a probate court of that state, but they were never appointed executors in Massachusetts. While one of the executors was casually in Massachusetts, it was attempted to revive the suit in the Federal Court against him by a bill of revivor. The Federal Court held, however, that the bill of revivor would not lie against him, because of the familiar rule that an executor or administrator cannot sue or be sued out of the jurisdiction of his appointment. It is as though it had been attempted to revive the suit in the Supreme Judicial Court in Equity for Suffolk County against the Michigan executors, if they had been casually within the jurisdiction of that court. But the case does not even touch the question whether, if the Federal Court had proceeded to final decree, such decree would have been conclusive in a collateral proceeding in California.

In Greer vs. Ferguson, 56 Ark. 324, also referred to by the Supreme Court of Michigan in support of its conclusion, one of the defendants to a suit in chancery in Arkansas died, a resident of Tennessee, and executors were appointed in the latter state, but were not appointed in Arkansas. The suit was first revived against an administrator *ad litem*, but afterwards the Tennessee executors appeared and were made defendants to the suit, which proceeded to final decree against them. On an appeal to the Supreme Court of Arkansas, it was held that the suit could not be revived against them, because their authority was limited to the jurisdiction of the Tennessee court which appointed them, and the decree was therefore reversed as to them. In that case, also, the Supreme Court of Arkansas did not touch upon the question whether, if the Arkansas court had proceeded to final decree, such decree would have been conclusive in a collateral proceeding in Tennessee. The question of the validity of the decree was raised in a direct proceeding, an appeal to the Supreme Court of Arkansas, not in a collateral proceeding like the case at bar.

In Judy vs. Kelley, 11 Ill., 211, also referred to by the Supreme Court of Michigan in support of its conclusion, the defendant to an action at law in Ohio died, and administrators of his estate were appointed in Illinois, but not in Ohio. The death of the deceased defendant was suggested of record and leave was granted to revive the

suit against his personal representatives, and the Illinois administrators appeared and defended the action, which proceeded to judgment against them. Suit was then brought on the judgment against the Illinois administrators in Illinois, but it was held that the judgment was not evidence of debt against them, because they had no authority to appear in their official capacity in the suit in Ohio, under the rule that administrators cannot sue or be sued out of the jurisdiction of the court by which they have been appointed. It is as though the Michigan executors in the case at bar had appeared in the suit in Massachusetts, without having themselves appointed executors in that state, and a decree had been rendered against them, which it was sought to enforce against them by action in Michigan. Under such circumstances, we believe that, upon the authority of Lawrence vs. Nelson, 143 U. S. 215, and other cases, such an action could be maintained, but it is not necessary for us to take that position in the case at bar, because the suit in Massachusetts was duly revived against the administrator with the will annexed appointed in that state. Under our view of the case at bar, it was not essential to the right of the Supreme Judicial Court in Equity for Suffolk County to proceed to final decree, that the suit should be revived against the Michigan executors. In that case, the court did not consider at all the question whether the Ohio court, having had jurisdiction in the lifetime of the deceased defendant of the subject matter and the parties to the suit, had the right to proceed to final judgment, but the opinion rests solely upon the ground that the Illinois administrators had no authority in Ohio. The distinction, recognized in Creighton vs. Murphy, supra, between cases where claims are filed *after* the death of the intestate and cases where suit is pending at the time of the death of the intestate, does not seem to have occurred to that court.

In Rentschler vs. Jamison, 6 Mo. App. 135, cited by counsel for defendant estate in the Michigan courts to the same point, suit was commenced by attachment in Illinois against a resident of Missouri, who, however, appeared and defended the action. Pending the suit, the non-resident defendant died, and an administrator of his estate was appointed in Missouri, but not in Illinois. The suit was revived against the Missouri administrator by publication under a statute of Illinois, but he did not appear and defend it and the suit proceeded to judgment against him. This judgment was then made the basis of

a proceeding against the estate in Missouri, but it was held that it was of no effect as against the estate in that state, because the suit could not be revived by publication against the Missouri administrator. It is as though it had been attempted to revive the suit in the Supreme Judicial Court in Equity for Suffolk County against the Michigan executors by publication under a Massachusetts statute. As we have said, under our view it was not necessary to revive the suit against the Michigan executors. The suit was duly revived against the administrator with the will annexed appointed in Massachusetts, and even if it had not been, the court could have proceeded to final decree. The same criticism that we have made of the case of Judy vs. Kelley, supra, is applicable to that case. Indeed, Judy vs. Kelley was chiefly relied upon by the court in that case in support of its decision. The court failed to recognize the distinction between cases where claims are filed *after* the death of the intestate and cases where suits are pending at the time of his death.

In Flandrow vs. Hammond, 13 N. Y. App. Div., 325, another case cited by counsel for the defendant estate to the same point, it was simply held that, where the defendant to a suit in New York died, the suit could not be revived against his executor appointed in Massachusetts, because the executor could not sue or be sued in New York. The question whether, if the New York court had proceeded to final judgment, such judgment would have been conclusive against the executor in an action in Massachusetts was not considered.

In several of the cases just discussed, it was said that the court where the suit was pending lost jurisdiction of the *person* of the defendant by his death, and as we have stated, that is the position taken by the counsel for the defendant estate and the Michigan courts in the case at bar. We think we have made it clear, however, that this position is right only in a limited sense. The death of a defendant to a pending suit takes away from the court the power to enforce its judgment or decree by process against his person, but it does not take away its jurisdiction *in personam* to proceed to judgment or decree. If this distinction is kept in mind, the error into which the courts fell in those cases will be manifest.

It is therefore clear that the conclusion reached by the Supreme Court of Michigan is not supported by those

cases. In none of them was the question raised in the case at bar even considered. While it could have been raised in two of them, Judy vs. Kelley, supra, and Rentschler vs. Jamison, supra, the fact remains that it was not passed upon in those cases. Those cases simply deal with the right of the court to revive the suit against a foreign representative, and not with its right to proceed to judgment independent of such revivor. We therefore insist that those cases do not militate against the doctrine laid down in Creighton vs. Murphy, supra, that the rule is different in cases where the court has acquired jurisdiction in the lifetime of the defendant over the subject matter and the parties to the suit then in cases where claims are filed *after* the death of the intestate.

The Michigan courts (trial judge, R., p. 6; Sup. Ct., R., pp. 190-1) have taken the position that the proceedings in the Supreme Judicial Court in Equity for Suffolk County, after the death of Fletcher, were *quasi in rem*, that is, that they affect only the administrator with the will annexed, and him only as to the estate in his possession; in other words, that they were, in effect, simply proceedings for the allowance of a claim against Fletcher's estate in Massachusetts. Having assumed a false premise, the Michigan courts have, of course, reached an erroneous conclusion. It is true that a proceeding for the allowance of a claim against the estate of a deceased person is a proceeding *quasi in rem*. A person's property comes into the custody of the law on his death, and all proceedings for its disposition—the allowance of claims, the distribution of the property to the heirs, or legatees, or devisees, etc.—are *in rem*, not *in personam*. In Lafferty vs. Bank, 76 Mich., 51, the case to which the trial judge referred (R., p. 6), Champlin, J., rendering the majority opinion, said:

> "Under our system the settlements of estates of deceased persons are essentially proceedings *in rem*, as they are in most of the other states, in which the *res* is the decedent's estate, and the *jus ad rem* is in the creditor."

In 2 Black on Judg., Sec. 808, it is said that probate adjudications are *quasi in rem*.

The allowance by a court, having the custody of the estate (*res*), of the claim of a creditor (*jus ad rem*) is merely an adjudication that the creditor is entitled to

sufficient of the estate (*res*) in the custody of the court to satisfy his claim, or, if such estate is insufficient to pay the debts of the deceased, that such creditor is entitled to a proportionate share thereof. Obviously, the allowance of a claim by a court against the estate in its custody cannot in any way affect the property of the deceased which is not in its custody. The allowance of the claim is not in the form of a judgment at common law. It has the effect of a judgment only as to the property in the custody of the court by which it is allowed.

La Roe vs. Freeland, 8 *Mich.*, 530.
Shurbun vs. Hooper, 40 *Mich.*, 503.
Johnson vs. Powers, 139 *U. S.*, 156.

In Johnson vs. Powers, supra, it is said:

> "The decision of the commissioners (on claims), or of the Circuit Court on appeal, should properly be only an allowance or disallowance of the claim, and not in the form of a judgment at common law. La Roe vs. Freeland, 8 Mich., 530. But, as between the parties to the controversy, and as to the payment of the claim out of the estate in control of the Probate Court, it has the effect of a judgment, and cannot be collaterally impeached by either of those parties. Shurbun vs. Hooper, 40 Mich., 503. * * * In the case at bar, the allowance of Johnson's claim by the commissioners appointed by the Probate Court in Michigan, giving it the utmost possible effect, faith and credit, yet, if considered as a judgment *in rem*, bound only the assets within the jurisdiction of that court, and, considered as a judgment *inter partes* bound only the parties to it and their privies. It was not a judgment against Stewart in his lifetime, nor against his estate wherever it might be; but only against his assets and his administrator in Michigan."

It is therefore undeniable that the mere allowance of a claim by a probate court, having the custody of assets of a deceased person, has no force or effect as a judgment outside of the jurisdiction of that court. But, as we have shown, the Supreme Judicial Court in Equity for Suffolk County possessed jurisdiction of the subject matter and the parties to the suit in the lifetime of Fletcher. The object of the suit was to obtain a discovery and accounting with respect to lands in Michigan. The land, not being

within the territorial jurisdiction of the court, its decree, or course, could only operate *in personam*, and not *in rem*. The suit was, therefore, a proceeding *in personam*, and not *in rem*.

It was originally the doctrine of courts of equity that their decrees could only operate *in personam*, and not *in rem*. This doctrine has been somewhat changed by modern legislation, but it is still the universal doctrine that where the subject matter of the suit, either real or personal property, is situated beyond the territorial jurisdiction of the court, the decree of the court can only operate *in personam*.

In 1 Pom. Eq. Jur. (3rd Ed.), Sec. 428, it is said:

> "In the infancy of the court of chancery, while the chancellors were developing their system in the face of a strong opposition, in order to avoid a direct conflict with the law and with the judgment of law courts, they adopted the principle that their own remedies and decrees should operate *in personam* upon defendants, and not *in rem*. The meaning of this simply is, that a decree of a court of equity, while declaring the equitable estate, interest or right of the plaintiff to exist, did not operate by its own intrinsic force to vest the plaintiff with the legal estate, interest or right to which he was pronounced entitled; it was not itself a legal title, nor could it either directly or indirectly transfer the title from the defendant to the plaintiff. A decree of chancery spoke in terms of *personal command* to the defendant, but its directions could only be carried into effect by his personal act."

In 4 Pom. Eq. Jur. (3rd Ed.), Sec. 1318, it is said:

> "The power to act *in personam*, through their remedies, is still held by all courts of equity, even in presence of the foregoing legislation. Of this nature must always be the remedies when the subject matter, either real or personal property, is situated beyond the territorial jurisdiction of the court, in another state or country. The jurisdiction to grant such remedies is well settled. Where the subject matter is situated in another state or country but the parties are within the jurisdiction of the court, any suit may be maintained and rem-

> *edy granted which directly affect and operate upon* the person of the defendant, and not upon the subject matter, although the subject matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain acts towards it, and it is thus ultimately but indirectly affected by the relief granted. As examples of this rule, suits for specific performance of contracts, for the enforcement of express or implied trusts, for relief on the ground of fraud, actual or constructive, for the final accounting and settlement of a partnership, and the like, may be brought in any state where the jurisdiction of defendant's person is obtained, although the land or other subject matter is situated in another state, or even in a foreign country."

The doctrine is recognized in both Massachusetts and Michigan.

> *Pingree vs. Coffin*, 12 *Gray*, 304-5.
> *Brown vs. Desmond*, 100 *Mass.*, 269.
> *Dunlap vs. Byers*, 110 *Mich.*, 109.
> *Noble vs. Grandin*, 125 *Mich.*, 383.

In Dunlap vs. Byers, supra, the following language from the case of Wood vs. Warner, 15 N. J. Eq., 81, is quoted with approval:

> "The strict primary decree of a court of equity is *in personam*, and not *in rem*, and the authority of this court to deal with contracts in relation to land not within the jurisdiction of the court is fully established."

It is thus clear that the suit in the Supreme Judicial Court in Equity for Suffolk County was a proceeding *in personam*. Having been a proceeding *in personam* in the lifetime of Fletcher, and the jurisdiction of the court not having been affected by his death, the suit remained a proceeding *in personam* until it was finally determined. It was not changed by his death from a proceeding *in personam* to a proceeding *quasi in rem*.

In Sheldon vs. Warner's Estate, 59 Mich., 444, a bill had been filed for the foreclosure of a mortgage, process had been personally served upon Warner, the mortgagor, and his default taken. Before the decree of foreclosure was made, Warner died. After his death, a decree of foreclosure was made, without the suit having been re-

vived, and the mortgaged premises were sold. The suit was then revived against Warner's administrator and a decree for a deficiency made. This claim was filed with the commissioners on claims as a claim against Warner's estate. In holding that this decree was a valid claim against his estate, Campbell, C. J., who rendered the majority opinion, said:

> "If Warner, had he lived, would have been liable to a *personal* decree, then there can be no doubt that his estate is liable for this deficiency. The bill was filed to enforce the personal obligation, as well as the security on the land. The decree of sale could not be made until the amount of the debt was determined. That determination must fix the amount of the debt, until reduced by the sale, and must stand as a judgment of the sum due, subject to such reduction.
>
> Warner's default made him, had he lived, subject to a decree both *personal* and for foreclosure. Under the statutes, both at law and in equity, the personal representative is the only person to be brought in as interested in a *personal claim against the estate*, and there is no rule which requires him to defend against a just claim, even if he could defend a claim that has already been taken as confessed against his decedent. * * * The same rule applies at law, and if the representative makes default, *a personal judgment is rendered against the estate*, and is evidence of a debt established, to be paid in due course of administration."

This case is cited by us simply to show that a *personal judgment against the estate of a deceased person*, rendered in a suit commenced in the lifetime of the decedent, is not unheard of, and that the suit is not changed by the death of the party from a proceeding *in personam* to a proceeding *in rem*.

As we have shown, a decree *in personam* operates *in personam* outside the territorial jurisdiction of the court, that is, it binds the *consciences* of the parties and the *consciences* of all persons in privity with them. If the decree in question had been rendered in Fletcher's lifetime, it would have bound him to satisfy it out of his property, whether situated in Massachusetts or in Michigan. As to property in Massachusetts, process could have issued out of the Supreme Judicial Court in Equity for

> edy granted which directly affect and operate upon the person of the defendant, and not upon the subject matter, although the subject matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain acts towards it, and it is thus ultimately but indirectly affected by the relief granted. As examples of this rule, suits for specific performance of contracts, for the enforcement of express or implied trusts, for relief on the ground of fraud, actual or constructive, for the final accounting and settlement of a partnership, and the like, may be brought in any state where the jurisdiction of defendant's person is obtained, although the land or other subject matter is situated in another state, or even in a foreign country."

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As we have shown, a decree *in personam* operates *in personam* outside the territorial jurisdiction of the court, that is, it binds the *consciences* of the parties and the *consciences* of all persons in privity with them. If the decree in question had been rendered in Fletcher's lifetime, it would have bound him to satisfy it out of his property, whether situated in Massachusetts or in Michigan. As to property in Massachusetts, process could have issued out of the Supreme Judicial Court in Equity for

Suffolk County; as to property in Michigan, his conscience merely would have been bound, and it would have been necessary to obtain a new judgment, based upon the decree which would have been conclusive evidence in an action thereon, before process could issue. After his death, that court had the same power as before, as we have shown, to render a decree in the suit. Those who came into possession of his property, out of which the decree could have been satisfied, had he lived, hold it only as he would have held it. They certainly have no greater rights therein. As to his property in Massachusetts, the administrator with the will annexed, who came into possession of it, was bound to apply it according to the law of that state, and if there had been any surplus after the payment of administration expenses—which there was not—he could have been compelled by the process of that court to apply it, as Fletcher could have been, in satisfaction of the decree. As to property in Michigan, the consciences of the Michigan executors are bound, as Fletcher's would have been, to apply it in satisfaction of the decree. They hold it only as he would have held it. They cannot be compelled by process from the Supreme Judicial Court in Equity for Suffolk County, as he could not have been, to apply this property in satisfaction of the decree. But, as the decree would have been conclusive evidence against him in an action based thereon, it is conclusive evidence against them in this proceeding. They stand merely in his shoes. The decree operates *in personam* against them, as it would have operated against him, not *in rem* against his property.

The Supreme Judicial Court in Equity for Suffolk County possessed jurisdiction over the subject matter and the parties to the suit in the lifetime of Fletcher, and therefore then had the power to make a decree that would operate *in personam*. As we have shown, the jurisdiction thus possessed by that court was in no way affected by his death. The only effect of his death was to suspend the right of that court to exercise that jurisdiction. As we have shown, the efficacy of this decree as evidence of debt in a collateral proceeding must be determined by the jurisdiction which that court acquired by the service of its process upon him and his appearance and defense of the suit, not by the jurisdiction, or rather right to exercise jurisdiction, acquired by the revivor of the suit, and therefore it seems to us that it logically follows that the decree is binding upon all persons who are in privity with him with respect to property, out of which it could

have been satisfied if he had lived. It has the same efficacy as evidence of debt in a collateral proceeding against those who are in privity with him in that respect as it would have against him, and, as it would be conclusive evidence of debt against him, it is conclusive evidence of debt against them.

How can it be said that the jurisdiction which that court possessed in Fletcher's lifetime to make a decree which would bind all such persons in privity (potentially) with him was in any way affected by his death—the event which created such privity between him and his Michigan executors? In his lifetime he and all persons in privity with him (potentially) in that respect, were subject to the jurisdiction of that court. After his death, all such persons who were in privity with him remained, or, perhaps more correctly, became subject to that court's exercise of its jurisdiction, because of the jurisdiction which it had acquired over him by the service of its process upon him and his appearance and defense of the suit, and they are therefore bound by the decree. His Michigan executors are bound by every legal obligation to which he was subject. Whatever would have bound his conscience binds theirs. In other words, if the expression may be allowed, they have succeeded to his conscience in respect to the assets in their possession, which is simply another way of saying that they are in privity with him. Where a judgment or decree is rendered against a deceased party, as we have shown it may be (supra, p. 28), it obviously can only be enforced against those who are in privity with him. It must of necessity operate *in personam* against them. Therefore, we insist that the decree is binding upon Fletcher's Michigan executors in respect to the estate in their possession.

The case of Dunlap vs. Byers, 110 Mich., 109, is like the case at bar in many essential features. In that case it was held (quoting from syllabus, language in parenthesis being ours):

1. A defendant who appears, and files his answer to a petition (or bill of complaint), thereby submits himself to the jurisdiction of the court (which was true as to defendant Fletcher in the suit in the Supreme Judicial Court in Equity for Suffolk County).

2. Where a court of one state has acquired jurisdiction of a proceeding for the dissolution of a partnership and for a settlement of its affairs, it has authority to determine all of the equities of the case, and may, therefore, adjudicate the rights of the parties as to real estate located in another state (which was done by the Supreme Judicial Court in Equity for Suffolk County).

3. While the decree itself, in such case, will not directly affect the transfer of title (or, in respect to any balance found due, is not enforceable by execution), *it will bind the consciences of the parties*, and can be enforced in the courts of the state where the property is located (and, in respect to any balance found due, is sufficient to authorize a judgment in an action upon such a decree;—does not the decree under consideration bind the consciences of all persons in privity with Fletcher, including the Michigan executors?)

5. A judgment of a court of competent jurisdiction in one state is conclusive upon the parties to the action, and their *privies*, in the courts of another state, and cannot be attacked, even upon the ground of fraud, except by a direct proceeding in the court in which it was rendered (which, we insist, answers in the affirmative the question suggested by head-note No. 3).

7. A finding of a court of another state, in a proceeding for an accounting between partners, that certain lands in this state (Michigan) were partnership lands, which had been sold with the consent of the parties, and the proceeds credited to the partnership, (which is what was done by the decree under consideration) is sufficient to authorize a decree as to such lands in an action to enforce in this state the decree of the foreign court, (and, in order to give complete relief, also to authorize a decree as to the state of the account between the partners).

In the Michigan courts, counsel for the defendant estate laid much stress upon the phraseology of the Massachusetts statutes (quoted supra, pp. 22-3) relative to the revival of suits on the death of a party, and argued that in the case at bar the only decree authorized by those statutes was one to be satisfied out of the property in the hands of the administrator with the will annexed. An examination of those statutes will show that they did not, as they could not, thus limit the authority of the Supreme Judicial Court in Equity for Suffolk County.

Section 5, Chapter 171, Mass. Rev. L., 1902, provides that where the suit is revived, the executor or administrator may appear and prosecute or defend "in the same manner as if the action had been commenced by or against him." This provision only regulates the *manner* in which the executor or administrator may appear and prosecute or defend, and not the faith and credit which shall be given in another state to a judgment against him.

Section 7 provides that if the executor or administrator does not appear on the return day of the citation, etc., judgment shall be rendered against him "in like manner as if the action had been commenced by or against him in his said capacity, except that he shall not be personally liable for costs, but the estate of the deceased in his hands shall be liable for the costs as well as for the debt or damages." This provision merely regulates the *manner* in which the judgment shall be rendered, and the liability for costs, and not the faith and credit which shall be given in another state to the judgment. Furthermore, by its terms it is only applicable where the executor or administrator makes default and not to cases, like that at bar, where he appears and defends.

The faith and credit which must be given in Michigan to a judgment rendered against an executor or administrator in a suit revived against him under the provisions of those statutes is governed solely by section 1, article 4, of the Constitution of the United States, and section 905, United States Revised Statutes. The statutes of Massachusetts do not, and could not, regulate the faith and credit which must be given in Michigan to such judgments.

Counsel for the defendant estate also called attention to the phrascology of the statutes of Massachusetts and Michigan relative to the authority of executors and administrators with the will annexed over the estate of their testator.

Sec. 9284, Mich. C. L. of 1897, is as follows:

> "When any will shall be allowed as mentioned in the preceding section, the probate court shall grant letters testamentary, or letters of administration with the will annexed, and such letters testamentary or letters of administration, shall extend to all the estate of the testator in this state."

Chap. 136, sec. 12, R. L. of Mass., 1902, is as follows:

> "After allowing a will under the provisions of the two preceding sections, the probate court shall grant letters testamentary on such will, or letters of administration with the will annexed, and shall proceed in the settlement of the estate which may be found in this commonwealth, in the manner provided in Chap. 143, relative to such estates."

It will be noted that these statutes provide that the authority of the executor or administrator with the will annexed shall extend to the estate of the testator in the respective states where they are appointed. It is obvious that they could not confer any greater authority over the estate on an executor or administrator with the will annexed. To illustrate, the Massachusetts statutes do not, and could not, confer authority over assets in Michigan on an administrator with the will annexed appointed in that state. However, it by no means follows that a judgment rendered against such an administrator with the will annexed, in a suit duly revived against him, would not be conclusive evidence in a proceeding like that at bar against the estate in Michigan.

In the matter under consideration, the administrator with the will annexed has never assumed any authority over Fletcher's estate in Michigan, and the case at bar is not a proceeding to determine the extent of his authority over that estate. The conclusiveness of the decree in this proceeding against the estate in Michigan is governed by the Federal Constitution and the Act of Congress, and not by the provisions of the Massachusetts statutes. Therefore, the fact that the administrator with the will annexed only had authority over the assets in Massachusetts is not important in the case at bar. It is merely begging the question to say that the decree is not conclusive against Fletcher's estate in Michigan, because the administrator with the will annexed had no authority over the estate in that State.

Furthermore, the construction placed upon the Massachusetts statutes by the Supreme Judicial Court in Equity for Suffolk County was not subject to review by the Michigan courts, and cannot be reviewed by this court. In so far as was within its power, that court has rendered a decree against Fletcher's estate in Michigan, that is, its decree runs against the Michigan executors

(R., p. 148). In other words, that court has, in effect, decided that these statutes did not so limit its authority that the decree rendered by it is one simply to be satisfied out of the assets in the hands of the administrator with the will annexed of Fletcher's estate, and this court must accept that construction.

Lewis' Sutherland on Statutory Construction, Secs. 314-319.

In Elmendorf vs. Taylor, 10 Wheat. (U. S.), Mr. Justice Marshall, in declaring the rule that the Federal courts adopt the construction placed upon a state statute by the courts of that State, said:

> "This court has uniformly expressed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognized, *that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government.* Thus, no court in the universe which professes to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and on the same principle the construction given by the courts of the several States to the legislative acts of those States is received as true, unless they come into conflict with the constitution, laws or treaties of the United States."

It is thus clear that there is no basis for the claim of defendant's counsel that the only decree which was authorized by the Massachusetts statutes was one to be satisfied out of the property in the hands of the administrator with the will annexed appointed in that State.

The Supreme Court of Michigan, in its opinion, said (R., pp. 190-1):

> "The statute procedure which resulted in the allowance of the will in Massachusetts and in the appointment there of an administrator was essentially a proceeding *in rem*. It was the exercise of the sovereign authority of the State over things within the State. The person appointed administrator was brought upon the record of the equity court as a party to the proceeding there depending and was personally before the court. This in no way enlarged his powers or the duties of his office. They were defined and limited by the law of the forum of his appointment and by the estate of the decedent coming to his possession or under his control. The ancillary character of his administration was disclosed by the record. The equity court did not, and did not assume to, act upon the estate but upon the administrator. As to him, its decree was satisfied when, giving it due credit and effect, he had distributed the estate according to the law of the forum. That estate has been administered and the decree of the equity court satisfied so far as it is possible to satisfy it by any person upon whom, personally, the court had, in conformity with jurisdiction acquired through its process or by voluntary appearance, authority to impose its judgment."

As we have said, the efficacy of the decree as evidence of debt in this proceeding must be determined by the jurisdiction acquired by the Supreme Judicial Court in Equity for Suffolk County by the service of its process upon Fletcher and his appearance and defense of the suit, not by the right to exercise its jurisdiction it acquired by the revival of the suit against the administrator with the will annexed. The "*statute procedure*" which resulted in the appointment of the administrator with the will annexed and the revival of the suit against him was only the *exercise* of jurisdiction, and therefore as we have said, can neither add to nor lessen the efficacy of the decree as evidence in a collateral proceeding. It is true that the bringing of the administrator with the will annexed upon the record as a party to the suit did not enlarge his powers or the duties of his office, but, on the other hand, it did not lessen the power of the Supreme Judicial Court in Equity for Suffolk County. The question is not as

to the powers and duties of the administrator with the will annexed, but as to the power of the Supreme Judicial Court in Equity for Suffolk County. While the powers and duties of the administrator with the will annexed were defined and limited by the law of the forum of his appointment and by the estate of the decedent coming into his possession or under his control, the power of the Supreme Judicial Court in Equity for Suffolk County must be determined by the jurisdiction it acquired by the service of process upon Fletcher and his appearance and defense of the suit.

The Supreme Judicial Court in Equity for Suffolk County did not act upon the estate, it is true; that is, its decree was not self-executing, as a decree *in personam* never is, and we have never claimed that it acted upon the estate, but it bound the administrator with the will annexed as to the estate in his hands, and it likewise bound the Michigan executors as to the estate in their hands, because they were in privity with Fletcher, over whom that court had acquired jurisdiction by the service of its process upon him and his appearance and defense of the suit, in respect to the estate in their hands out of which the decree could have been satisfied if he had lived. As to the administrator with the will annexed, that court had power to compel him by its process to apply the estate in his hands towards the satisfaction of the decree; as to the Michigan executors, that court could not compel them by its process to satisfy its decree, but the decree operates *in personam* against them in Michigan, as would any decree of a court of chancery outside the territorial jurisdiction of the court which rendered it; that is, it is conclusive evidence of debt in this proceeding. As to the administrator with the will annexed, it was satisfied when he had distributed the estate in his hands according to the law in Massachusetts, but it was not thus satisfied as to the Michigan executors. As we have said, that court had acquired jurisdiction by service of its process upon Fletcher and his appearance and defense of the suit, to impose its decree upon him, and the revival of the suit and the rendition of the decree were only the exercise of that jurisdiction, and therefore the decree binds all those who are in privity with him in the respect aforesaid, which includes the Michigan executors. As to them, it was not satisfied by the distribution of Fletcher's property in Massachusetts, according to the law of that State, as it would not have been satisfied as to him by the appli-

cation of his property in that State towards its satisfaction. It is conclusive evidence of debt in this proceeding as it would have been conclusive evidence of debt in an action against him in Michigan.

Counsel for the defendant estate will doubtless cite in their brief, as they did in the Michigan courts, many cases which hold that a judgment recovered against an administrator of a deceased person in one State, in an action commenced against such administrator, is no evidence of debt in an action against an administrator in another State. Such cases have no application to the case at bar. They are based upon the rule that there is no privity between administrators in different States. Here the suit was not commenced against the administrator with the will annexed, and the conclusiveness of the decree as evidence of debt in this proceeding is not dependent upon the existence of privity between him and the Michigan executors. It results from the jurisdiction which the Supreme Judicial Court in Equity for Suffolk County possessed in Fletcher's lifetime over the subject matter and the parties to the suit, irrespective of whether the administrator with the will annexed and the Michigan executors are in privity. His conscience, and the consciences of all persons in privity (potentially) with him with respect to property out of which the decree could have been satisfied if he had lived, were subject to the jurisdiction of that court, regardless of whether the persons who are in privity with him in that respect are in privity with each other. Herein lies the difference between a decree made against a legal representative of a deceased person in a suit commenced in the lifetime of such person and a decree made against a legal representative of a deceased person, in a suit commenced after the death of such person. In the former case, the jurisdiction is *in personam*, and the consciences of all persons in privity with such deceased persons in the respect aforesaid are bound by the decree; in the latter case, the jurisdiction is *in rem*, and only the conscience of the administrator in the state where the suit is commenced is bound by the decree, and his only as to the estate in his hands.

Where no suit is pending at the time of the death of a debtor, there is no particular hardship in requiring a creditor to present his claim for allowance to the Probate Court which has the custody of the estate out of which he wishes to obtain satisfaction of his claim. Where,

however, as in the case at bar, the suit is pending at the time of the death of the debtor, where the court has acquired full jurisdiction over the subject matter and the parties, where the liability of the debtor has been determined and nothing remains to be done except to ascertain the extent of such liability, it would be not only a great hardship, but, in the case at bar, a practical denial of relief to require the creditor to present his claim anew to the Probate Court which happens to have the custody of the property out of which the creditor must obtain, if at all, satisfaction of his claim.

In discussing the objections to the doctrine, nowhere recognized in this country, that all the evidence and merits of a cause are open to examination and review in an action upon a foreign judgment, Story, in his work on Conflict of Laws, says, Sec. 607:

> "Some of the witnesses may be since dead; some of the vouchers may be lost or destroyed. The merits of the cause, as formerly before the court upon the whole evidence, may have been decidedly in favor of the judgment; upon a partial possession of the original evidence, they may now appear otherwise."

In the matter under consideration, the transactions out of which the litigation arose commenced in 1856—a half century ago—and ended in 1873—35 years ago—the three Campbells, White and Fletcher are dead—all the parties to those transactions. Undoubtedly many of the vouchers and books of account are lost or destroyed. Even the original of the "$9,000 obligation" was not produced before the master. Fletcher produced a writing, apparently claiming it was the original, upon which the endorsements of payments were false and fictitious. What living witness is there who could testify to the falsity of those endorsements? When it is recalled that the principal controversy was in respect to this obligation, the hardship of a doctrine which would require the plaintiff in error to present his claim anew is apparent.

Therefore, we submit that, upon principle and authority, the Supreme Judicial Court in Equity for Suffolk County, having had jurisdiction in Fletcher's lifetime over the subject matter and the parties to the suit, and on his death the suit having been duly revived against

the administrator with the will annexed, the decree made by that court is conclusive evidence of debt in this proceeding against Fletcher's estate in Michigan.

Fletcher's Michigan executors and the administrator with the will annexed of his estate in Massachusetts are in such privity that the decree is conclusive evidence of debt in this proceeding.

As we have stated, George M. Fletcher died testate November 5, 1899. Allan M. Fletcher and Frank W. Fletcher were appointed executors of his will by the Probate Court of Wayne County, Michigan. Fletcher left a small amount of property in Massachusetts, but his Michigan executors refused or neglected to have themselves appointed executors of his will in that state, as they could have done by appointing a resident agent to receive service of process against them. Accordingly, Frank B. Cotton was appointed administrator with the will annexed by the Probate Court of Middlesex County, Massachusetts. The death of Fletcher was duly suggested of record in the suit pending in the Supreme Judicial Court in Equity for Suffolk County, and the administrator with the will annexed cited to appear as a party defendant to that suit, and he did thus appear, and that court proceeded to make a decree against him.

It is our contention that the administrator with the will annexed had the same powers and duties regarding the administration of Fletcher's estate in Massachusetts as the executors would have had if they had qualified as such in that state; that if a decree could have been made against them, if they had qualified in that state, which would have been conclusive evidence of debt against Fletcher's estate in Michigan in a proceeding like that at bar, then that the decree against the administrator with the will annexed is conclusive evidence of debt in this proceeding against that estate.

There is little distinction between the powers and duties of executors and administrators with the will annexed. In regard to the powers and duties which pertain to the office, there is no difference.

1 *Woerner's Am. Law of Ad., Sec.* 178.
Schouler on Ex'rs. and Admrs., Sec. 123.

11 *Am. & Eng. Encyc. of L.* (*2nd Ed.*), 1320.
18 *Cyc.*, 1321-2.

In Woener's Am. Law of Ad., supra, it is said:

"It has been shown that the chief distinction between an executor and administrator lies in the source of their appointment, and in the fact, that the one disposes of the estate according to the directions of a testator, while the other is governed in this respect by the general law. The distinction is still fainter in cases where a will exists and, from any cause, there is no executor. In such case the Probate Court designates a person to carry out, or execute, the will, which is then annexed to and becomes part of his letters; from which circumstance he is known as administrator (not executor, because not nominated by the testator) *cum testamento annexo*, or administrator with the will annexed. Since it is his duty to dispose of the property of the testator in accordance with the provisions of the will, it is obvious that his powers can differ but slightly from those of an executor. Indeed, the difference sometimes insisted upon—that an administrator *cum testamento annexo* cannot execute such power conferred by the testator upon the executor as may be beyond the ordinary functions of an executor—is not in reality a difference between the administrator and executor at all, because powers beyond the ordinary functions of executors are to that extent a testamentary trust, and vest in him as such trustee, not because he is executor, but in addition to and independent of his office as such. Since all the duties of an executor pertaining to his office as such devolve to the administrator with the will annexed, *the latter possesses, generally, the same powers, is bound by the same duties, and subject to the same liabilities as the former*, whether appointed originally or upon the death, removal, or resignation of the executor; but the powers and duties not necessarily connected with the functions of an executor devolve upon the administrator with the will annexed only when it appears clearly from the will that the testator so intended."

In Schouler on Ex'rs. and Ad'mrs., supra, it is said:

> *"The functions of administrator with the will annexed are, in general, those of exectuor; for the Probate Court makes him pilot by substitution, to steer like an executor by the chart which the deceased has left behind.* His letters are worded to fit the case; but he qualifies substantially as an administrator. A will is not vitiated by the failure of executors to carry out its provisions; and the full appointment of an administrator with the will annexed assumes, though not perhaps conclusively, that the court has, in point of fact, admitted the will to probate."

In 11 Am. & Eng. Encyc. of L., supra, it is said:

> "At common law an administrator with the will annexed succeeds to all the powers and is charged with all the duties which pertain by law to the office of executor, or which are conferred by the will on the executor, as such, and do not involve any personal confidence or trust, but are annexed by the will to the office of executor."

In 18 Cyc., supra, it is said:

> "As a rule, both at common law and in many jurisdictions by virtue of express statute, an administrator with the will annexed possesses the same rights and powers, and is subject to the same duties and liabilities as though he had been nominated executor by the will."

The executors and administrator with the will annexed were respectively appointed by the Probate Courts of Michigan and Massachusetts to execute the will of George N. Fletcher, the will was the *"rule of administration"* for each, the executors had the same duties in regard to the property in Michigan as the administrator with the will annexed had in regard to the property in Massachusetts, and the executors had the same responsibilities in regard to creditors in Michigan that the administrator with the will annexed had in regard to creditors in Massachusetts; in short, there was no difference in the powers and duties which pertained to their respective offices. The executors and the administrator with the will annexed were alike interested in paying the legally established debts of Fletcher, and in resisting the

establishment against his estate of illegal claims. The relationship to Fletcher's estate was mutual and, therefore, they are in privity.

The term *privity* denotes *mutual* or successive relationship to the same rights of property. There are several classes of privies, viz: privies in estate, privies in blood, privies in representation, and privies in law. Executors, or administrators with the will annexed, and their testator are privies in estate.

> 23 *Am. & Eng. Encyc. of L.* (*2nd Ed.*), 101.
> *Words and Phrases, Vol.* 6, *pp.* 5606-5611.
> 1 *Greenl. Ev., Sec.* 189; *Sec.* 523.

In 1 Greenl. Ev., Sec. 523, it is said:

> "The term privity denotes *mutual* or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings, to which he was a party, is, that they are *identified* with him in interest; and wherever this identity is found to exist, all are alike included. Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity."

This language is quoted with approval in the following cases:

> *Litchfield vs. Goodnow*, 123 *U. S.*, 549.
> *Williams vs. Barkley*, 58 *N. E.*, 768.
> *Pennington vs. Hunt*, 20 *Fed.*, 195.

It is thus clear that both the executors and the administrator with the will annexed are in privity with their testator, Fletcher. Counsel for the defendant estate will argue, however, that the executors are in privity with Fletcher only in respect to his estate in Michigan, and that the administrator with the will annexed is in privity with him only in respect to his estate in Massachusetts, but there can be no doubt under the authorities that executors of the same testator appointed in different states are in such privity with each other that a judgment against one in the state of his appointment is conclusive upon the others in the states of their appointment, and as an administrator with the will annexed is *substantially* the same as an executor, it follows that a

judgment against an administrator with the will annexed appointed in one state is likewise conclusive upon the executors of the same testator appointed in other states.

In Hill vs. Tucker, 13 How. (U. S.), 458, Robinson, a resident of Virginia, died testate, leaving property in Virginia and Louisiana. By his will he appointed executors in both States. In an action to enforce against his estate in Louisiana certain judgments recovered against his executors in Virginia, his Louisiana executors claimed that these judgments were no evidence of debt against them, and set up the defense of the statute of limitations. Mr. Justice Wayne, in delivering the opinion of this court, said:

> "The executor's interest in the testator's estate is what the testator gives him. That of an administrator is only what the law of his appointment enjoins. The testator may make the trust absolute or qualified in respect to his estate. It may be qualified as to the subject matter, the place where the trust shall be discharged, and the time when the executor shall begin and continue to act as such. He may be executor for one or several purposes—for a part of the effects in the possession of the testator at the time of his death, or for such as may be in action, if it be only for a debt due. But though the executor's trust or appointment may be limited or though there are several executors in different jurisdictions, and some of them limited executors, *they are, as to the creditors of the testator, executors in privity, bearing to the creditors the same responsibilities as if there was only one executor.* The privity arises from their obligations to pay the testator's debts, wherever his effects may be, just as his obligation was to pay them. The executor's interest in the testator's estate is derived from the will, and vests from the latter's death, whatever may be the form which the law requires to be observed before an executor enters upon the discharge of his functions. When within the same political jurisdiction, however many executors the testator may appoint, all of them may be sued as one executor for the debts of the testator, and they may unite in a suit to recover debts due to their testator, or to recover property out of possession. All of them, then, having the same privity with each other and to the

testator, and *the same responsibility to creditors,* though they may have been qualified as executors in different sovereignties, an action for a debt due by the testator, against any one of them in that sovereignty where he undertook to act as executor, places all of them in *one relation* concerning it, and as to the remedies for its recovery. * * * Between administrators deriving their commissions to act from different political jurisdictions there is no such privity. * * * Each is privy to the testator, and would be estopped by a judgment against him, but they have no privity with each other in law or estate, etc. * * * For the same reasons, notwithstanding the privity that there is between executors to a testator, we do not think that a judgment obtained against one of several executors would be conclusive as to the demand against another executor, qualified in a different State from that in which the judgment was rendered. But such a judgment may be admissible in evidence in a suit against an executor in another jurisdiction for the purpose of showing that the demand had been carried into judgment in another jurisdiction against one of the testator's executors, and that the others were precluded by it from pleading prescription or the statute of limitations upon the original cause of action."

In Goodall vs. Tucker, 13 How., 469, the facts were the same as in Hill vs. Tucker, supra. At the close of the testimony the plaintiff asked the court to decide, as if instructing the jury, among other things (2) "that the exemplification of the record and the judgment obtained by the plaintiff against the executors, Allen and Johnson, and the return of *nulla bona* thereon, are evidence against the defendant, a co-executor in Louisiana"; also, (3) that "co-executors, unlike co-administrators, are privies in estate, because they derive the same privities over the same estate from the same will; and that under the will of Robinson, which was read, and the proofs of the qualification which are offered in this case, the plaintiff is entitled to recover against the defendant the amount of the judgment obtained by him against the only acting executors of the domicile of the decedent." In holding that the case was governed by Hill vs. Tucker, Mr. Justice Wayne, who delivered the opinion of this court, said:

"We think that *all* the prayers for the plaintiff were properly made, and that conjointly they make an issue decidedly in his favor."

In Turley vs. Dreyfus, 33 La. Ann., 885, one Wilson died testate, and his son was appointed executor in both Tennessee and Louisiana. A judgment was recovered against the son, as executor in Tennessee. This judgment was appealed to the Supreme Court of that State, and pending the appeal, the son died. After his death an administrator *de bonis non* was appointed in Tennessee and a dative executor was appointed in Louisiana. The administrator *de bonis non* succeeded the executor as defendant in the suit pending on appeal in Tennessee, and the Supreme Court of that State affirmed the judgment. An action was brought upon this judgment against the dative executor in Louisiana. In holding that the judgment against the administrator *de bonis non* was evidence of a debt against the dative executor, the court said:

"The proceedings in this case * * * is not directed against the debtor himself, but against one appointed to execute his will.

Had the judgment declared upon been rendered against an administrator appointed by the proper court in Tennessee to administer and liquidate the succession of James H. Wilson, Sr., in that State, and this suit were brought to enforce such judgment against a different administrator in this State, the latter might have pleaded *res inter alios acta*, as there would exist no privity between them, for the reason that they would derive their commissions from different political sovereignties.

But it has been held that the case might be different if the same person were administrator in both States. A difference was likewise signalized between executors of the same testator, some of whom resided in one State and others in another, and all appointed by the same will, each qualifying in the State of his residence and where one is administrator with the will annexed.

In such a case, although the judgment was not admitted to be conclusive, it was recognized as a *proper basis for an action*, and was permitted to go in evidence, because there is a privity of right and official identity between executors, inasmuch as their powers emanate from the testator, and the judgment against one, in one State, may be right-

> fully brought into administration in the other State by proper proceeding against the executor locally existing there. 13 How., 458-469. * * * We do not wish to be understood as holding that the judgment declared upon is conclusive of what it decrees. The judgment is a *valid cause of action*, and is open to all the defenses which can be legally opposed to judgments. If recognized as valid and in existence, it can have no greater force than would be claimed for a similar one, rendered by a competent court in this State."

In Hopper vs. Hopper, 125 N. Y., 400, a resident of New Jersey died testate, his will was admitted to probate in that State, and letters testamentary issued to the executrix, who resided there. The executrix also took out ancillary letters in New York. A creditor, who resided in Georgia, commenced suit against the ancillary executrix in New York. Among the reasons urged why the action ought not to be maintained was that it was the duty of the ancillary executrix to transmit all the assets in that State to herself as domiciliary executrix in New Jersey, that a foreign creditor could not prevent such transmission, and, therefore, that the court should "not sit to decide a mere abstract question or perform an idle ceremony." In holding that the suit could be maintained, the court said:

> "While we are not required for present purposes to decide upon its (judgment) legitimate force and effect, and that question should be left until it arises, it is enough to say that the judgment may avail the plaintiff in *two* directions, even if it were certain that he could not reach assets here. If he should be driven to the forum of original probate jurisdiction, the case of Hill vs. Tucker (13 How., 458) indicates that the judgment would be at least *prima facie* evidence of the indebtedness and, if not conclusive, would at least bar the statute of limitations, which otherwise might apply."

In Garland vs. Garland, 84 Va., 181, Samuel Garland, a resident of Virginia, died testate, leaving property in Mississippi and Virginia. Burr Garland, of Mississippi, was appointed administrator with the will annexed in that State. Burr Garland died testate, also leaving property in Mississippi and Virginia. By his will he ap-

pointed William H. Garland executor in Mississippi, and C. Y. Morriss was appointed administrator with the will annexed in Virginia. A decree was made against the executor in Mississippi in favor of Samuel Garland's estate and an action was brought against the administrator with the will annexed in Virginia upon this decree. The lower court held that the action would not lie. The Supreme Court, in reversing the judgment, said:

> "This is not a suit against the administrator of a decedent of one State to enforce against him a judgment or decree recovered against a different administrator of the same decedent in another State. The decree sought to be enforced was not a decree against an administrator—it is a decree obtained against Burr Garland's executor in Mississippi; and the object of the bill is to enforce that decree against the Virginia administrator with the will annexed of Burr Garland. Substantially and virtually in law, the bill is to enforce against Burr Garland's Virginia executor (C. Y. Morriss, administrator c. t. a.), a decree previously obtained against Burr Garland's Mississippi executor. An administrator with the will annexed is *substantially* the same as the executor named in the will; and he has the same powers and is subject to the same duties and liabilities. Between executors of the same decedent in different jurisdictions, there is a privity derived from or through the will of the testator, and a judgment or decree against either is evidence against the other, and may be enforced against each (see Hill vs. Tucker, 13 Howard, 458), *and is sufficient to ground a suit or action on against either executor.* An administrator with the will annexed is, in legal contemplation, executor of that will, and a decree against a domiciliary executor binds every executor of the same will in every jurisdiction.
>
> The basis and cornerstone of the appellant's bill is the decree of the Mississippi court, and the settlement made there, ascertaining the indebtedness of Burr Garland to the estate of appellant's testator, and putting the same under control of appellant for distribution, in Virginia, to those entitled under the will of Samuel Garland, Sr. The decree of the Mississippi court ordering the ancillary administrator c. t. a. to pay, and putting him under a legal obligation to pay over an ascer-

tained and adjudged indebtedness of Burr Garland to the domiciliary administrator c. t. a. of Samuel Garland, Sr., enables the latter to sue the former in Mississippi for the amount decreed; for 'where anyone is under legal obligation to pay, the law will imply a promise;' and as he might be sued in Mississippi both by the express statute of that State and by the international law, so he might be, if caught in Virginia, under the Constitution of the United States requiring that 'full faith and credit shall be given'—in Virginia—'to the judicial proceedings of every other State'—to the decrees of the courts of Mississippi.

As evidence of an ascertained indebtedness, this decree of the Mississippi court must be taken as final and conclusive in any court of any State. In matters of local character, exclusively within the cognizance and jurisdiction of the courts of any State—such as the accounts of personal representatives and the administration of assets of decedents within the jurisdiction of that State, no other State courts can consider, or settle, or revise, or reverse the settlement made by a State court of competent jurisdiction over the subject matter and the parties. The decree of the Mississippi court must be accepted as final and conclusive evidence of the fact and amount of indebtedness by Burr Garland, the Mississippi administrator of Samuel Garlend, to Samuel Garland's estate. It did not undertake to distribute it, nor to determine who are entitled to receive it under Samuel Garland's will, but decreed it to be paid over to the Virginia domiciliary executor, to be by him distributed to those entitled according to the declared intention of the testator. And this is in accordance to the well-recognized and every-day practice, *to the end that there may be one homogeneous administration, and that the creditors and legatees may get their dues without pursuing two representatives in different jurisdictions.*

The appellant is competent to prosecute this debt due his testator's estate by the authority of the Virginia court appointing him, and by the decree of the Mississippi court he has a right of action, and the Circuit Court of Lynchburg erred in dismissing his bill for want of it. The fact and the amount of the debt of Burr Garland, administrator c. t. a. of S. Garland's estate, having been

finally and judicially ascertained, appellant had a right to be entertained in the equity court at once, and to have discovery of assets and proper account. Appellee, as administrator of Burr Garland in Virginia, was not entitled to notice of the proceedings in Mississippi to settle the Mississippi account of Burr Garland's administration of S. Garland's estate in Mississippi; but, in fact, he and Morriss's trustee and Paulina B. Morriss were all made parties and were duly summoned by publication, and by mail, withal. If no settlement were final until parties interested and living out of the State were personally served with process, there could be no final settlement of any estate as to legatees and distributees living out of the State where the account has to be settled."

In the case at bar, as we have said, the Michigan executors and Frank W., Allan M. and Grace W. Fletcher, the children and residuary legatees of Fletcher, were given personal notice in Michigan to appear and defend the suit in the Supreme Judcial Court in Equity for Suffolk County. While this was not necessary, under the authority of Garland vs. Garland, it at least shows, as we said before, that every possible notice and opportunity to appear and defend was given them.

In the case at bar, counsel for the defendant estate argued in the Michigan courts that this court only intended to hold in the case of Hill vs. Tucker, supra, that the judgment against the Virginia executors merely precluded the Louisiana executor from setting up the statute of limitations as a defense, and the Supreme Court of Michigan, in its opinion, quoted (R., p. 193) from the opinion of this court in Carpenter vs. Strange, 141 U. S., 87, certain language which it apparently thought indicated that such was the understanding of this court. In that case Mr. Chief Justice Fuller said:

"In Hill vs. Tucker, 13 How., 458, it was held that as the interest of an executor in the testator's estate is what the testator gives him, while that of an administrator is only that which the law of his appointment enjoins, *executors in different States are, as regards the creditors of the testator, executors in privity, bearing to the creditors the same responsibility as if there was only one executor.* And that although a judgment obtained

> against one executor in one State is not conclusive upon an executor in another, yet it is admissible in evidence to show that a demand has been carried into judgment, and the other executors are precluded by it from pleading prescription or the statute of limitations upon the original cause of action."

In Carpenter vs. Strange, this court held that a decree rendered against an executor in New York, appointed as such in that State, was conclusive upon her as executor in a suit in Tennessee, she also having been appointed as such in that State. The reference in the opinion in that case to Hill vs. Tucker was only incidental, and what was said regarding it was not necessary to a decision of the case. Furthermore, we do not think the language above quoted necessarily requires the construction placed upon it by the Supreme Court of Michigan. Mr. Chief Justice Fuller expressly said that it was held in Hill vs. Tucker that "executors in different States are, as regards the creditors of the testator, executors in privity, bearing to the creditors the same responsibility as if there was only one executor." Is not that just what we contend in the case at bar? He then said that a judgment against an "executor in one State is not conclusive upon an executor in another," but that the judgment is admissible in evidence to show that a demand has been carried into judgment and that the other executors are precluded from setting up the statute of limitations. He did not say that it was held in that case that such a judgment is *only* admissible in evidence to show that a demand has been carried into judgment and that the other executors are precluded from setting up the statute of limitations. It does not follow, simply because he expressly mentioned one purpose for which such a judgment is admissible in evidence, that he meant to convey the impression that it is this court's understanding that it was intended to be held in that case that such a judgment is not admissible in evidence for any other purpose. It is not fair to say that express mention of one purpose necessarily excludes all other purposes.

That the language above quoted from Carpenter vs. Strange was not, in fact, meant to convey the impression that it is the understanding of this court that it was only intended to be held in Hill vs. Tucker that the judgment against the Virginia executors merely precluded the Louisiana executor from seting up the statute of limita-

tions, is apparent from what this court held in that case. If there is no privity between executors of the same testator appointed in different states, then there is no principle upon which the decision of this court in that case, that the decree against the executor in New York was conclusive upon her in Tennessee, can be justified. The fact that there was only one executor can make no difference. In New York, she was bound, not as an individual, but in her official capacity as executor; in Tennessee, she was bound in her official capacity as executor, not as an individual. Her powers and duties as executor in New York were as separate and distinct from her powers and duties as executor in Tennessee as would have been the powers and duties of co-executors appointed in those States. She did not carry any of the official authority derived from her appointment in New York with her into Tennessee. Strictly speaking, the suit in New York and the suit in Tennessee were not between the same parties. It is, therefore, clear that the decision in Carpenter vs. Strange rests, in fact, upon the doctrine of privity. That necessarily being true, it is very unlikely, it seems to us, that this court would intentionally in its opinion in that case convey the impression that it is its understanding that it was only intended to be held in Hill vs. Tucker that the judgment against the Virginia executors merely precluded the Louisiana executor from setting up the statute of limitations. Certain it is that such is not the construction placed upon Hill vs. Tucker in cases where the question has directly arisen.

In Turley vs. Dreyfus, supra, Hill vs. Tucker is cited as authority for the proposition that the judgment against the Tennessee administrator *de bonis non* was *"a valid cause of action"* against the Louisiana dative executor, the court holding that it was only open to such defenses as might be made against a similar judgment, rendered by a competent court of Louisiana. In Hopper vs. Hopper, supra, Hill vs. Tucker is cited as authority for the proposition that a judgment against the New York ancillary executrix would be *prima facie* evidence in an action against the New Jersey domiciliary executrix. In Garland vs. Garland, supra, Hill vs. Tucker is cited as authority for the proposition that the judgment against the Mississippi executor was evidence against the Virginia administrator with the will annexed, and that it was *"sufficient to ground an action on against either (the Mississippi or the Virginia) executor."*

In the face of the construction placed upon the opinion in Hill vs. Tucker in these cases, it is difficult to understand how it can seriously be claimed that this court only intended to hold that the judgment against the Virginia executors merely precluded the Louisiana executor from setting up the statute of limitations as a defense. Any lingering doubt as to what this court intended to hold in Hill vs. Tucker should be removed by what it did hold in Goodall vs. Tucker, supra. In the last mentioned case, this court expressly held, in deciding that the plaintiff's second and third prayers were properly made, that the judgment against the Virginia executors was such evidence against the Louisiana executor as entitled the plaintiff to a judgment against that executor. It seems clear, therefore, that this court did not intend to hold in Hill vs. Tucker that the judgment against the Virginia executors merely precluded the Louisiana executor from setting up the statute of limitations as a defense. It intended to hold, and did hold, that such a judgment, while not conclusive, was evidence of a debt in the action against the Louisiana executor.

In saying that the judgment was not conclusive evidence in the action against the Louisiana executor, the court only meant that the judgment might be impeached like any other judgment of a sister state, that is, for want of jurisdiction to render the judgment. The weight of authority is to the effect that a judgment of a sister state is conclusive upon the merits of a controversy, but that it may be impeached for lack of jurisdiction in the court rendering such judgment.

> 13 *Am. & Eng. Encyc. of L.* (*2nd Ed.*), 983-991-1048.
> *Story's Conflict of Laws, secs.* 608-9.
> 1 *Greenl. Ev., secs.* 546-7-8.

In Story on Conflict of Laws, Sec. 608, it is said:

> "The general doctrine maintained in the American courts in relation to foreign judgments certainly is that they are *prima facie* evidence, but that they are impeachable. But how far and to what extent this doctrine is to be carried does not seem to be definitely settled. It has been declared that the jurisdiction of the court, and its power over the parties and the things in controversy, may be inquired into; and that the judgment may be

impeached for fraud. Beyond this no definite lines have as yet been drawn."

Sec. 609 is as follows:

"By the constitution of the United States it is declared that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And congress, in pursuance of the power given them by the constitution in a succeeding clause, have declared that the judgments of state courts shall have the same faith and credit in other states as they have in the state where they are rendered. They are therefore put upon the same footing as domestic judgments. But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was rendered to pronounce the judgment, nor an inquiry into the right of the state to exercise authority over the parties or the subject-matter, nor an inquiry whether the judgment is founded in and impeachable for a manifest fraud. The constitution did not mean to confer any new power upon the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other states. And they enjoy not the right of priority, or privileges, or lien which they have in the state where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgment."

It will be noted that Story lays down the doctrine that a judgment of a sister state may be impeached for manifest fraud. This doctrine is probably supported by the weight of authority, but is not universally recognized.

13 *Am. & Eng. Encyc. of L.* (*2nd Ed.*), 1048-9.

It is not necessary for this court to pass upon this question, however, as there is no claim that the decree made by the Supreme Judicial Court in Equity for Suffolk County was procured by fraud. The sole question is whether or not that court had jurisdiction. Viewed in

the light of these authorities, there can be no doubt that Hill vs. Tucker is authority for the proposition that a judgment against an executor in one state is evidence of debt in an action against an executor in another state, and that such judgment, while not conclusive, can only be impeached for lack of jurisdiction in the court rendering it, or possibly for manifest fraud. Hill vs. Tucker and Carpenter vs. Strange, considered together, certainly establish the rule, we submit, that a judgment against an executor in one state is conclusive evidence of debt in an action against an executor of the same testator in another state.

Latine vs. Clements, 3 Kelly (Ga.), 426, is the nearest like the case at bar in respect to the question now under consideration of any case that we have been able to find. In that case, Mrs. Clements, a resident of Virginia, died testate, leaving property in Virginia and Georgia. By her will she appointed an executor in Virginia, and a judgment was recovered against him. An administrator with the will annexed was appointed in Georgia to administer her estate there. An action was brought against the administrator with the will annexed upon the judgment recovered against the executor, and the administrator with the will annexed demurred upon the ground that an action would not lie against him upon a judgment recovered against the executor in Virginia, but that an action should have been brought upon the original claim. The lower court sustained this demurrer. In reversing that judgment, the Supreme Court said:

> "It may be stated, as a general proposition, that judgments rendered by a court of competent jurisdiction, and not tainted with fraud, are conclusive upon parties and privies. There are limitations to this general rule which I need not now stop to notice. It is also true, as a general rule, that an action may be sustained upon a foreign judgment, to enforce it in a different jurisdiction. The weight of authority in England is to the effect, that a foreign judgment *in personam*, rendered without fraud, by a court of competent jurisdiction, is not only *prima facie* but conclusive evidence of a debt due. There, however, as to this point, the authorities are in conflict.
>
> The general doctrine maintained in the United States is, that foreign judgments *in personam*, are *prima facie* evidence, but that they are impeach-

able. How far, and to what extent, they are liable to impeachment, does not seem to be settled. The regard which the courts of one sovereign state pay to judgments rendered in the courts of other states, is founded in justice and expediency. Comity between states is necessary to commerce, progress in civilization, security of property, and national independence. Hence, for the most part, according to the laws and customs of nations, judgments receive abroad the faith and credit which they are entitled to at home. The states of our Union are, with some limitations, sovereign states; they are sovereign, except insofar as they have surrendered their sovereignty to the general government; upon the general principles already adverted to, touching judgments, they are to be treated as foreign states, yet, their mutual relations are rather those of domestic independence, than of foreign alienation. But the constitution has not left the force and effect of the judgments of one state, to be determined upon general principles in the other states: it has declared what shall be their force and effect; it provides, 'that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state.' Congress has declared what the constitution means by full faith and credit; it has enacted that the judgments of state courts shall have the same faith and credit in other states, as they have in the state where they are rendered. They are put upon the same footing with domestic judgments; but this does not prevent inquiry into the jurisdiction of the court in which the original judgment was rendered, or into the right of the state to exercise authority over the parties or the subject matter; or the inquiry whether the judgment is founded in fraud. The constitution confers no new power on the states, but regulates the effect of their acknowledged jurisdiction over persons and things within their territory. It does not make the judgments domestic to all intents and purposes, but gives general validity, faith and credit to them, as evidence.

By the principles stated, we are conducted to the conclusion that the judgment from Virginia, upon which this action was brought, upon general principles, but more especially by the constitution and laws of the United States, is put upon the

footing of a domestic judgment as evidence, and that in Georgia it is entitled to the same faith and credit that it receives in Virginia. The next inquiry, therefore, is, what faith and credit is it entitled to in that state? I know of no statute law of Virginia which defines the faith and credit to which it is there entitled. The common law is there in force and we are remitted to that to answer the last question. There, by the common law, it is binding upon parties and privies, and may be enforced by execution or *scire facias;* if there binding upon parties and privies it is also here binding upon parties and privies. If it may there be enforced by execution or *scire facias,* it may be enforced here by action. This judgment is against the executor in Virginia; the suit here is against the administrator with the will annexed; the parties then are not the same. Is the administrator with the will annexed, a privy to the defendant in the judgment, the executor in Virginia? Or rather, had administration with the will annexed been taken out in Virginia, after the decease of the executor, he leaving no executor, would there have been privity between the executor and the administrator? The question is reduced to that, for if there would be in that state of the case, privity in Virginia, the judgment, according to common law principles, could be there enforced against the administrator; that would be the faith and credit which it would have in that state, and to the same faith and credit, it is entitled in Georgia.

The term privity denotes *mutual* and successive relationship to the same rights of property. There are privies in estate, privies in blood, and privies in law. The last class, to-wit, privies in law, are also designated as privies in representation, as executors and testator, administrators and intestate. If there is privity in the case before us, it is the privity of representation. There was privity, unquestionably, between the testatrix, Mrs. Clements, and her executor. So there always is between executors and administrators, and their testator or intestate. Before proceeding further, it may be proper to state that the executor derives all his power from his appointment in the will; that is the law of his action; he represents the person of the testator, and acquires the legal title to

the whole of his personal estate; he can sue and be sued, and has the right of defense co-equal with that of the testator, whilst in life he is, emphatically, the personal representative of the testator his duties are not imposed by law, and his powers are not derived from the ordinary; they are delegated to him by the testator.

Now, an administrator *de bonis non*, is the only representative of the original deceased. He has the same powers as to the estate left unadministered, which the original representative had. He succeeds to all the rights and obligations which appertain to the original executor or administrator, in his representative capacity. All this is eminently true of an administrator with the will annexed. He derives his authority to act from the will; he is bound to follow its directions; it is the law of his trust. He derives his appointment from the ordinary, it is true, and the executor receives his letters testamentary, also from the ordinary, *but the will is the rule of administration for both.* The probate of the will, and the qualifying of the executor, and the appointment and qualification of the administrator with the will annexed, are merely conditions precedent, which the law imposes, to the exercise of the trust. *The authority to act, flows, in either case, from the testator.* Now, the executor is in privity with the testator; so is the administrator with the will annexed; and if both are in privity with the common testator, *it is difficult to imagine that they are not in privity with each other.* In the case supposed, of an executor in Virginia dying intestate, and an administrator *de bonis non, cum testamento annexo*, is not the administrator the successor of the executor? Does he not succeed to all the rights as trustee, which belonged to the executor, as such? Is not the administration of the executor, so far as it is perfected, according to the provisions of the will, binding on the administrator? To my mind, this is a plain case of successive representation, and therefore, of privity in law. If, in such a case in Virginia, there is privity, then a judgment obtained in that state against the executor in such a case, could be enforced by *scire facias* there, against the administrator; and if it could, then it is entitled to the same faith and credit in Georgia and may be

enforced here against an administrator with the will annexed, by suit. It is evidence of a debt due as much in Georgia as it is in Virginia. Is the law of this case different, because of the fact that it is not the case supposed? This is the case of a will, and an executor, and a judgment against him in Virginia, and an administrator with the will annexed in Georgia. The administrator in Georgia is necessary, because the Virginia executor has no nower to act in Virginia; the two states are sovereign, and as to each other, foreign. But in this case the same things are true as stated concerning the hypothetical case. The will is the law as to both trustees; both are in privity with the testator. The execution of the will in Virginia, so far as it has gone, is binding upon the administrator in Georgia; and the rights of creditors, perfected against the executor in Virginia, are perfect rights in Georgia against the administrator. The remedy to enforce them may be different—in this case is different. As to remedies, the law of the forum governs. * * *

The courts here will presume that the court in Virginia having jurisdiction, did its duty, and also that executor did his, and therefore that the judgment was rightfully rendered; and, being authenticated according to the act of congress, it appears before this court, and did appear before the court below, as a valid, subsisting judgment. * * * The case of two administrators, each deriving his authority from the ordinary of different states, is very different from this case, where there was an executor, and an administrator with the will annexed, both deriving their authority from the testator through his will. In the former case it is admitted that there is no privity, and in the latter I have endeavored to show that there is privity. Indeed, inasmuch as those cases (between two administrators) went upon the ground that there was no privity, the inference is a fair one, that in cases where there is privity, the action will be sustained."

The Supreme Court of Michigan, in its opinion, said (R., p. 192):

"The Massachusetts administrator derived none of his interest or powers from Mr. Fletcher. To Mr. Fletcher and his testamentary disposition of

property he was a stranger. The notion of the unity or identity of the *res* and the one of the privity of the representatives of the estate, which are essential to the theory of claimant, are not available here. The fact that the administrator in Massachusetss took the title of administrator with the will annexed did not have the effect to create privity with the domiciliary executors. It was the act of a person with interests adverse to those of the estate, permitted by the law of the forum in the interest of creditors of the decedent. In this view, Latine vs. Clements, 3 Ga., 426; Garland vs. Garland, 84 Va., 181, and other cases in accord with these, are not authority here."

While the administrator with the will annexed of course received his appointment as such from the Probate Court of Middlesex County, Massachusetts, and not from Fletcher, the will of Fletcher was annexed to his letters of administration, as his title indicates, and was his *"rule of administration."* If Fletcher had not left property in Massachusetts, the administrator with the will annexed could not have been appointed, and if Fletcher had not left a will, obviously it could not have been annexed to his letters of administration. It is therefore indisputable that his interest and powers were derived from Fletcher, and that he is not a stranger to Fletcher's testamentary disposition of his property; in fact, under all the authorities, he is in privity with Fletcher. It was not the act of Frances M. Brown, in filing the petition for the appointment of the administrator with the will annexed, but the act of Fletcher, in making a testamentary disposition of his property, that gave to the Probate Court of Middlesex County authority to confer upon the legal representative appointed by it the title of administrator with the will annexed. If Fletcher had not made a testamentary disposition of his property, that court would have had no authority to confer that title upon the legal representative appointed by it. While the filing of the petition by Frances M. Brown may be said to have been the act of a person with interests adverse to the estate, it was merely taking advantage, as she had the legal right to do, of conditions created by Fletcher.

As we have said, the Michigan executors could have had themselves appointed executors in Massachusetts, and if they had done so, they would have been in a position to oppose the proceedings for the revival of the

suit and for the rendition of the decree instituted by those whose interests were adverse to the estate. But there is no claim that they could have opposed the revival of the suit and the rendition of the decree with any greater success than did the administrator with the will annexed. The presumption is, as stated in Latine vs. Clements, supra, *that the administrator with the will annexed did his duty.* What could he have done that he did not do? Fletcher had already been found liable and the arbitrator was about to determine the extent of his liability. The administrator with the will annexed could not undo what had been done. The fact that the petition for his appointment was filed by one with interests adverse to the estate is therefore unimportant.

Furthermore, the doctrine of privity between an executor appointed in one state and an administrator with the will annexed of the same testator appointed in another state, does not take into account the fact whether the administrator with the will annexed is friendly or unfriendly to the estate. It rests upon the fact that an administrator with the will annexed is *substantially* an executor, and that executors of the same testator appointed in different states are in privity. It is thus clear, we submit, that there is no basis for the distinction attempted to be made between the case at bar and the cases of Latine vs. Clements and Garland vs. Garland.

In the research that we have made, we have found no case, and counsel for the defendant estate and the Michigan courts have cited no case, which, when carefully examined, is in conflict with the doctrine for which we contend. Certain cases were cited by counsel for the defendant estate and the Michigan courts in which it was held that a judgment recovered against an administrator in one state was no evidence of debt in an action against an administrator in another state, or in which it was held that the allowance of a claim by a probate court of one state against the estate in its custody was no evidence of debt in a proceeding against the estate in another state. The former are based upon the rule that between administrators in different states, unlike between executors, there is no privity; the latter are based upon the rule simply that the allowance of a claim by a probate court against the estate in its custody is a judgment *in rem*, which has the effect of a judgment only as against

that estate. We fail to see, therefore, how these cases are in any way applicable to the case at bar.

In Stacy vs. Thrasher, 6 How., 44, it was held that a judgment recovered against a Mississippi administratrix was no evidence of debt in an action against a Louisiana administrator. The case recognized the rule (p. 59) that such a judgment is conclusive by way of estoppel between the same parties and their privies, but holds that there was no privity between the Mississippi administratrix and the Louisiana administrator. If it had been held that there was such privity, then it would necessarily have followed that the judgment was conclusive upon the Louisiana administrator. As we have shown, Hill vs. Tucker, Goodall vs. Tucker, and Carpenter vs. Strange, certainly establish the rule in this court that there is privity between executors of the same testator appointed in different states. It is therefore evident that this court did not intend to hold in Hill vs. Tucker that the judgment against the Virginia executors merely precluded the Louisiana executor from setting up the statute of limitations. If there was privity between the executors, as this court held there was, it followed from the doctrine laid down in Stacy vs. Thrasher that such a judgment is conclusive by way of estoppel upon parties and privies, that the judgment against the Virginia executors was conclusive by way of estoppel against the Louisiana executor, and impeachable only for want of jurisdiction, or perhaps for fraud. Indeed, such a position was taken in Latine vs. Clements (supra, p. 81) relative to the Virginia executor and the Georgia administrator with the will annexed. Stacy vs. Thrasher, in holding that the judgment against the Mississippi administratrix was not conclusive upon the Louisiana administrator because there was no privity between them, only serves to emphasize the doctrine laid down in Hill vs. Tucker, and follows to its legitimate conclusion in Carpenter vs. Strange, that a judgment against an executor in one state is conclusive upon an executor of the same testator in another state, because they are in privity.

In McLean vs. Meek, 18 How. (U. S.), 16, it was held that a decree against a Tennessee administrator was no evidence of debt in an action against a Mississippi administrator. The case simply follows Stacy vs. Thrasher, supra.

In Aspden vs. Nixon, 4 How., 467, it was held that a decree, made in the high court of chancery in England, in a suit wherein an administrator appointed there was complainant, and an executor qualified there was defendant, did not estop an administrator appointed in Pennsylvania, from suing the same executor qualified in Pennsylvania, upon the same title asserted in the English bill, the subject matter of the first suit being assets in England, and of the second suit, assets in Pennsylvania. The case is based upon the fact that the subject matter of the suit in England and the subject matter of the suit in Pennsylvania was not the same. The suits were to determine the heirs-at-law of the testator, who left estate both in England and in Pennsylvania. The suit in England involved only the assets there, while the suit in Pennsylvania involved only the assets there. The question of privity between the English representatives and the Pennsylvania representatives was not raised or considered.

In Dixon's Executors vs. Ramsey's Executors, 3 Cranch, 319, it was simply held that an executor appointed in a foreign country cannot by virtue of such appointment sue in this country. The case, however, recognizes the distinction between the sources from which executors and administrators derive their power, but holds that that does not affect the right of an executor to sue or be sued out of the jurisdiction of his appointment.

In Noonan vs. Bradley, 9 Wal., 394, it was simply held that an administrator appointed in one state cannot, by virtue of such appointment, maintain an action in another state. The case simply follows the general rule that an administrator or executor cannot sue or be sued out of the state of his appointment.

In Vaughn vs. Northrup, 15 Pet., 1, it was simply held, in accordance with the well established rule, that an executor or administrator cannot sue or be sued out of the jurisdiction of his appointment, that an administrator appointed in Kentucky could not be sued in the District of Columbia. The question of privity between legal representatives appointed in different states was not raised or considered.

In Johnson vs. Powers, 139 U. S., 156, it was held that a creditor's bill based upon the allowance of a claim against the estate of an intestate by commissioners on claims appointed by the Probate Court of Wayne County,

Michigan, could not be maintained in New York against persons alleged to hold assets of the intestate. No administration had ever been had in that state, and the allowance of the claim only bound the assets in Michigan, because the authority of the administrator did not extend beyond the assets in Michigan. The case in that respect simply follows Stacy vs. Thrasher, and like cases. The allowance of the claim by the commissioners was a mere adjudication that the creditor was, as we have shown (supra, pp. 47-8), entitled to a proportionate share of the estate in the custody of the probate court. It had no other force or effect as a judgment, and therefore was no basis for the maintenance of a creditor's bill in New York.

In Reynolds vs. Stockton, 140 U. S., 254, a New Jersey insurance company failed, and a receiver was appointed by a chancery court of that state, and such receiver was also appointed ancillary receiver by a proper court in New York. Suit was commenced by certain policyholders against the ancillary receiver in New York and the Superintendent of Insurance of that state to reach a fund in the latter's custody, and a decree was in due course rendered which made final disposition of this fund. Subsequently the receiver resigned in New Jersey and was succeeded by another receiver. There was no substitution in New York, but an order was later made discharging the ancillary receiver. After his discharge, a decree was rendered against him in the suit above mentioned for over a million dollars. This decree was then presented in New Jersey against the new receiver there, but the New Jersey courts refused to recognize it, and this court affirmed their action.

This court placed its decision chiefly upon the ground that the decree rendered by the New York court was not responsive to the issues tendered by the pleadings. In the case at bar, there is no question but that the decree was responsive to the issues tendered by the pleadings. The suit was for a discovery and an accounting and the decree is simply for the amount found due on the accounting. In that case, this court did say that the New York court had no authority to render a decree against the ancillary receiver, because he had ceased to be such. This court then proceeded to consider what the effect of the decree would have been against the new receiver in New Jersey, if the ancillary receiver had not been discharged at the time of its rendition, and expressed the opinion that, upon the authority of Johnson vs. Powers, supra,

the decree would simply have bound the assets in New York because the New York court would only have had authority to adjudge with respect to the assets in its custody; in other words, that the proceedings would have been *quasi in rem*. This court expressly distinguished the case from one where jurisdiction is acquired before administration proceedings are commenced. It said:

> "Whatever may be the rule if jurisdiction is acquired by a court before administration proceedings are commenced, the moment they are commenced, and the estate is taken possession of by a tribunal of a state, that moment the party whose estate is thus taken possesion of ceases to have power to bind the estate in a court of another state, either voluntarily or by submitting himself to the jurisdiction of the latter court."

In the case at bar, the Supreme Judicial Court in Equity for Suffolk County had acquired jurisdiction before administration proceedings were commenced, and it is not claimed that Fletcher, whose estate was taken possession of in such proceedings, thereafter submitted himself to the jurisdiction of that court. It is thus clear that the supposed case considered by this court is not analogous to the case at bar.

In Low vs. Bartlett, 8 Allen (Mass.), 259, one Mussey, a resident of Massachusetts, died testate. An executor of his will was appointed in Massachusetts, and an administrator of his estate (it does not appear from the opinion that he was an administrator with the will annexed) was appointed in Vermont. One Low presented a claim to the commissioners on claims appointed in Vermont, under statutes similar to those of Michigan, and this claim was finally allowed. He then attempted to enforce it against the exeuctor in Massachusetts. The court held that he could not do this because there was no privity between the Vermont administrator and the Massachusetts executor; that the Vermont administrator only had authority over the assets in Vermont and the Massachusetts executor only had authority over the assets in Massachusetts.

As we said with reference to Johnson vs. Powers, supra, the allowance of the claim by the commissioners in Vermont was a mere adjudication that the creditor was entitled to a proportionate share of the estate in the

custody of the probate court in that state. It had the effect of a judgment only as to the assets in that state, and of course was of no force or effect against the executor, or the estate, in Massachusetts. The Vermont Probate Court never had jurisdiction to render a judgment which could in any way affect the estate in Massachusetts, and the judgment which it rendered was only in *rem*, that is, against the property (*res*) in its possession. This feature of Low vs. Bartlett is very clearly pointed out in Johnson vs. Powers. In that case this court said:

> "In Low vs. Bartlett, above cited, following the decisions of this court, it was held that a judgment allowing a claim against the estate of a deceased person in Vermont, under (Vermont) statutes similar to those of Michigan, was no competent evidence of debt in a suit in equity brought in Massachusetts by the same plaintiff against an executor appointed there, and against legatees who had received money from him; the court saying 'the judgment in Vermont was in no sense a judgment against them, nor against the property which they had received from the executor.'"

In Ela vs. Edwards, 13 Allen (Mass), 49, one Westboro, a resident of Massachusetts, died testate, leaving property in Massachusetts and in New Hampshire. One Ela was appointed executor in Massachusetts and ancillary administrator in New Hampshire. His account as ancillary administrator in New Hampshire showed a balance due him, and this account was duly allowed by the New Hampshire Probate Court. In his account as executor filed in the Massachusetts Probate Court, he included the balance adjudged to be due him by the New Hampshire Probate Court. The Massachusetts Probate Court disallowed this item on the ground that its allowance by the New Hampshire Court was of no force or effect against the estate in Massachusetts, and the Supreme Court of that state affirmed its disallowance. The court said:

> "The item which he (the executor) asked to be allowed in his account, which is the balance due him on the settlement of his account as administrator in New Hampshire, is created by the allowance there of a debt which he proved against the estate. That allowance established a claim in his favor against the assets in that jurisdiction.

> * * * The New Hampshire Court had no jurisdiction over it for the purpose of binding the assets in Massachusetts."

It is thus clear that the allowance of the claim by the New Hampshire Probate Court was a mere judgment in *rem*, that is, an adjudication that the ancillary administrator in that state was entitled to a proportionate share of the assets (*res*) in its custody.

In Clark vs. Blackington, 110 Mass., 369, the question was in regard to the force and effect which should be given by the Massachusetts Probate Court to the allowance by the Rhode Island Probate Court of the account of the ancillary administrator in that state. The court simply followed Ela vs. Edwards, supra, in holding that the allowance of the account by the Rhode Island Probate Court was of no force or effect against the estate in Massachusetts. The allowance of the account by the Rhode Island Probate Court was a mere adjudication that the ancillary administrator was entitled to a proportionate share of the estate in its custody.

The distinction between the above mentioned cases and the case at bar is clear. In those cases, the allowance of the claims by the commissioners on claims, appointed by the probate courts—courts of *limited* jurisdiction—had the force and effect of judgments only as to the estate in their custody. In the case at bar, the Supreme Judicial Court in Equity for Suffolk County is a court of *general* equity jurisdiction, and, where it has jurisdiction of the subject matter and the parties to the suit, its decree binds not only all the parties to the suit, but also all persons in privity with them outside of its territorial jurisdiction. The nature of the judgment or decree in those cases is vitally different in every particular from that of the decree under consideration.

The trial judge, in directing a verdict, called attention to the fact that in some of the cases cited by us the judgments had been recovered against domiciliary representatives and were sought to be enforced against ancillary representatives, while the reverse is true in the case at bar (R., pp. 6-7). The Supreme Court of Michigan also attached great importance to this fact. In its opinion, it said (R., p. 192):

> "Whatever may be the relations of two or more co-executors residing in different states, in each of which states the testator left property, and whatever the liability of a sole executor who, for the purpose of administering the estate, secures his own appointment in a state other than that having primary probate jurisdiction, to admit in every jurisdiction the force and validity of a judgment properly pronounced against him in any jurisdiction, it is clear that the domiciliary executor and the estate in the state of decedent's domicile cannot be affected by the acts of a foreign administrator or by any judgment or decree rendered against such foreign administrator in the state of his appointment."

It seems to us that this is a distinction without a difference. The important fact is that there is privity, not that one is an ancillary and the others domiciliary representatives. If there is privity between a domiciliary and an ancillary representative, it can make no difference against which the judgment is recovered. As we have shown, the term privity denotes *mutual* or successive relationship to the same rights of property, and it exists as well between a domiciliary and an ancillary representative as between an ancillary and a domiciliary representative. Therefore, a domiciliary and an ancillary representative are *mutually* bound by a judgment against either. The doctrine of privity is not one-sided. A domiciliary representative is as much bound by a judgment against an ancillary representative as an ancillary representative would be bound by a judgment against a domiciliary representative.

In Creighton vs. Murphy, supra, the judgment had been recovered against the ancillary administrator and was enforced against the domiciliary administrator. In Hopper vs. Hopper, supra, it was held that if a judgment should be recovered against the ancillary executrix, it would be *prima facie* evidence of debt in an action against the domiciliary executrix. In the other cases cited by us, it is true that judgments were recovered against the domiciliary representatives and were enforced against the ancillary representatives, but in none of the cases cited is any importance attached to the fact whether the judgments sought to be enforced had been recovered against an ancillary or a domiciliary representative. As we have said, the important fact was that there was privity, not

that one was an ancillary and the other a domiciliary representative. It is thus clear, we submit, that it is of no importance in the case at bar that the decree, which it is sought to enforce against the estate of the testator at his domicile, is against his ancillary representative.

Therefore, we submit that, upon principle and authority, there is such privity between the Michigan executors and the administrator with the will annexed that the decree is conclusive evidence of debt in this proceeding against Fletcher's estate in Michigan.

The decree was properly made in favor of Albert W. Brown, individually.

A minor question which counsel for defendant estate may raise (as they raised it in the Michigan courts), is whether the decree was properly made in favor of Albert W. Brown, individually, instead of as administrator and executor. Neither the Circuit Court of Wayne County nor the Supreme Court of Michigan passed upon this question, but each determined the case upon the merits. The trial judge, in directing a verdict, stated that other objections than those considered by him had been made, but, in view of the position he had taken, that he did not consider it necessary to consider them (R., p. 7). The Supreme Court of Michigan made no reference in its opinion to any objections other than those considered by it. Both courts apparently assumed, for the purpose of their decisions, that the decree was properly made in favor of Brown. That the decree was rightfully made in his favor is, we believe, beyond question.

As we have stated, Frances M. Brown was the sole heir-at-law of William White, he having died intestate. All his property, both real and personal, descended to her, the legal title to his real estate vesting in her on his death, and the legal title to his personalty vesting in his administrator pending the settlement of his estate. Therefore, the arbitrator found that Albert W. Brown, as administrator of White's estate, was entitled to recover White's proportion of the money received by Fletcher from the sale or other disposition of the lands prior to White's death, for the reason that White's proportion of the money thus received was personalty, and that Albert W. Brown, as executor of the will of Frances M. Brown,

was entitled to recover her proportion of the money thus received by Fletcher after the death of White, for the reason that White's interest in the lands, being realty, vested in her on his death. By her will Frances M. Brown made Albert W. Brown her sole legatee and devisee. He was made executor of her will and succeeded her as administrator of White's estate. Therefore, the legal title to White's proportion of the money thus received by Fletcher prior to White's death was vested in Albert W. Brown, as administrator of White's estate, while the equitable title thereto was vested in Albert W. Brown, individually, subject to the payment of the debts, if any, against White's estate; and the legal title to Frances M. Brown's proportion of the money thus received by Fletcher after White's death was vested in Albert W. Brown, as executor of her last will, while the equitable title thereto was vested in Albert W. Brown individually, subject to the payment of the debts, if any, against her estate. Brown testified that there are no debts against either the estate of White or the estate of Frances M. Brown (R., p. 3). This was *prima facie* evidence, at least, that there were no debts, and therefore, under the authorities, Brown had the right to turn over to himself his claims and demands, as executor and administrator, on account of the money thus received by Fletcher.

This precise question was before the Supreme Court of Michigan in the case of Ewers vs. White's estate, 114 Mich., 266. Mrs. Ewers was made residuary legatee under the will of Mrs. White, and was appointed executrix of Mrs. White's will. John B. White, the husband of Mrs. White, was indebted to his wife for money which he held as her agent. After his death, Mrs. Ewers, individually, presented a claim against his estate to the commissioners on claims, instead of presenting it in her representative capacity. In holding that the claim was properly presented, that court said:

> "It is claimed that the claimant should have instituted these proceedings in her representative capacity. The court charged, in substance, that if, at the time of the alleged agreement in September, the funeral expenses had been paid, and there was no indebtedness against the estate, Mrs. Ewers, as the sole residuary legatee, and Dr. White, as the husband of Mrs. White, were the only persons interested in the estate of Mrs. White, and that Mrs. Ewers might turn over to herself this claim. We think this instruction correct.

> It is insisted that the evidence does not show that there were no debts. This question was not contested on the trial. Mrs. Ewers testified that there were no debts. * * * We think, therefore, that there was sufficient evidence to show *prima facie* that there were no debts."

It is therefore clear that the decree was properly made in favor of Albert W. Brown, who was a party to the suit. Strangely enough, counsel for the defendant estate overlooked, in the Michigan courts, the fact that Brown, individually, had become a party to the suit (R., pp. 105-7), which probably accounts for the position they took with reference to the decree being made in his favor. He filed a petition on December 30th, 1902, for leave to become a party, individually, which petition was duly allowed (R., p. 107). Citation to appear and take upon himself the defense of the suit was served upon the administrator with the will annexed on May 4th, 1900 (R., pp. 79-80). While it does not affirmatively appear from the exemplified copy of the record that notice of Brown's petition for leave to become a party was served upon the administrator with the will annexed, that is an objection which cannot be raised in a collateral proceeding like that at bar.

The rule is universal that where the court has jurisdiction of the parties and the subject matter in the particular case, its judgment, unless reversed or annulled in some proper proceeding, is not open to attack or impeachment, by parties or privies, in any collateral action or proceeding whatever.

> 17 *Am. & Eng. Encyc. of L.* (*2nd Ed.*), 1042.
> *Black on Judg., Sec.* 245.
> *Dunlap vs. Byers*, 110 *Mich.*, 109.
> *Stearns vs. Wiborg*, 123 *Mich.*, 584.

This rule applies to objections to parties to the suit.

> *Black on Judg., Sec.* 264.

In Black on Judgments, Sec. 912, it is said:

> "Where, in the case of a foreign judgment, it does not appear by the record that any notice was given to the party affected by the action of the court in resuming its jurisdiction, it will be presumed that, according to the practice of the court,

> no such notice was necessary, or that, if necessary, it was in fact given."

In Sanford vs. Sanford, 28 Conn., 6, the objection was that it did not appear from the record that notice had been given to the defendant of a motion to set aside a nonsuit. In holding that this objection could not be made in a collateral proceeding, the court said:

> "On this point we think that, the court being one of general jurisdiction, there is a presumption of law which cannot be contradicted that such jurisdiction was rightfully exercised, and that the giving of such a notice, if necessary, is to be presumed. It is a case for the application of the familiar maxim, applicable to the proceedings of every court having jurisdiction of a case—*omnia presummuntur solemnitor esse acta*—under which it is presumed that the decisions of such a court are well founded, and its judgments regular, and that facts, without proof of which its judgments would not have been rendered, were proved before it."

It is therefore clear that the decree cannot be attacked in this proceeding on the ground that notice of Brown's petition was not given. Furthermore, as neither the Circuit Court of Wayne County nor the Supreme Court of Michigan passed upon the question whether the decree was properly made in favor of Albert W. Brown, we do not believe this court can consider and determine it on this writ of error. The Michigan courts, in assuming for the purpose of their decisions that the proceedings by which Brown became a party to the suit were regular and that the decree was properly made in his favor, thereby to that extent gave full faith and credit to the records and judicial proceedings of the Supreme Judicial Court in Equity for Suffolk County. The rule is settled that a decision of a state court giving full faith and credit to a judgment of a court of a sister state is not subject to review by this court on writ of error.

Lynde vs. Lynde, 181 *U. S.*, 183.

Therefore, we submit, first, that the decree was properly made in favor of Albert W. Brown; second, that the defendant estate cannot attack the decree on that ground in this proceeding; and third, that in any event this court cannot consider the question on this writ of error.

In conclusion, we respectfully submit:

1. A Federal question is involved, which gives this court jurisdiction on this writ of error to the Supreme Court of Michigan.

2. The Supreme Judicial Court in Equity for Suffolk County, Massachusetts, having had jurisdiction in Fletcher's lifetime over the subject matter and the parties to the suit, and on his death the suit having been duly revived, the decree is conclusive evidence of debt in this proceeding.

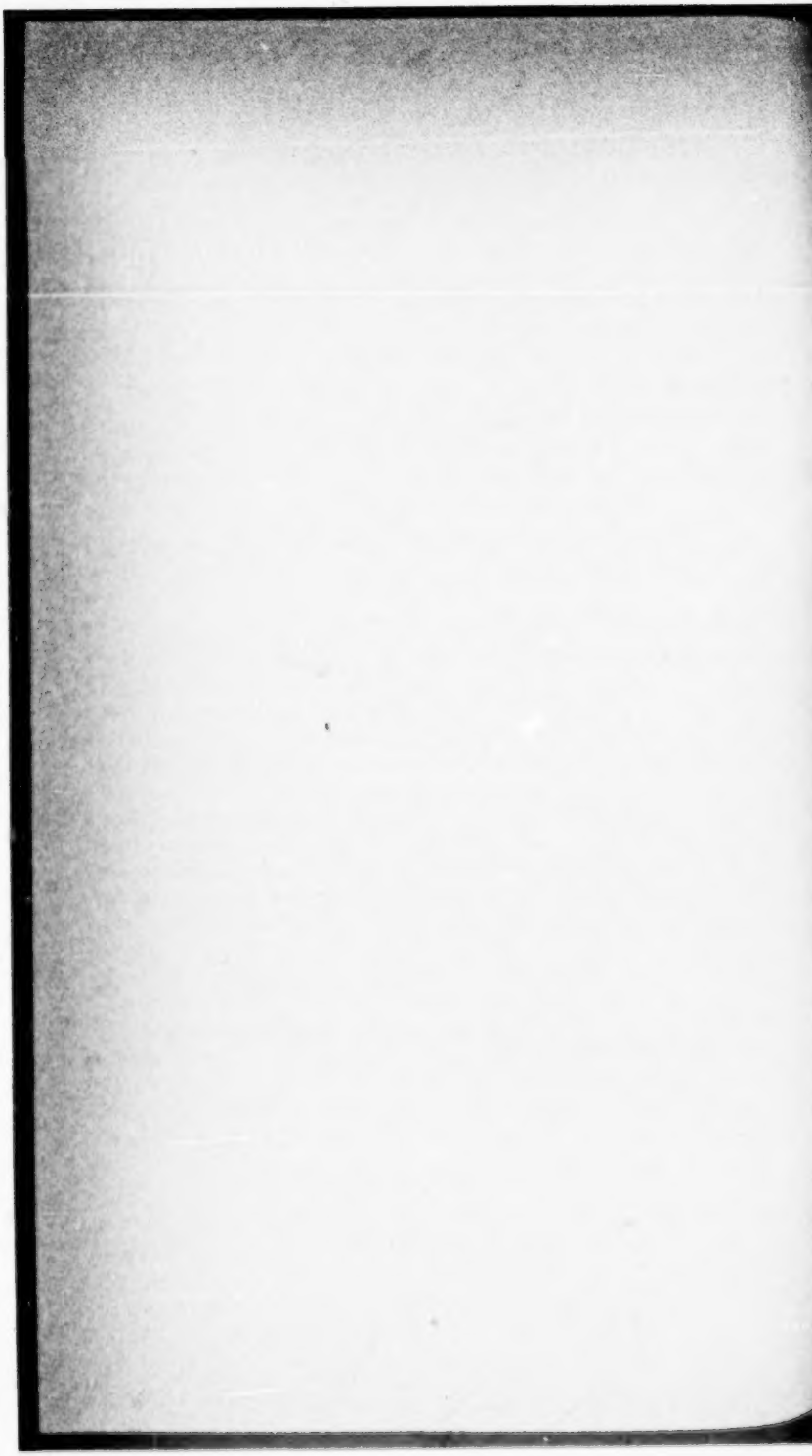
3. Fletcher's Michigan executors and the administrator with the will annexed of his estate in Massachusetts are in such privity that the decree is conclusive evidence of debt in this proceeding.

4. The decree was properly made in favor of Albert W. Brown, individually.

Therefore, it necessarily follows that the Michigan courts failed to give full faith and credit to the decree of the Supreme Judicial Court in Equity for Suffolk County in accordance with section 1, article 4, of the Constitution of the United States, and section 905, United States Revised Statutes, and the judgment of the Supreme Court of Michigan should be reversed, and the cause remanded to that court with instructions to enter judgment in favor of the plaintiff in error for the full amount due him under the said decree, or such further proceedings should be had as may be determined upon by this court to the end that justice may be done in the premises.

HARRISON GEER,

Attorney for Plaintiff in Error.



Supreme Court of the United States

OCTOBER TERM, 1907.

No. 220.

Office Supreme Court, U. S.
FILED.
APR 13 1908
JAMES H. McKENNEY,
CLERK.

ALBERT W. BROWN, PLAINTIFF IN ERROR,

vs.

THE ESTATE OF GEORGE N. FLETCHER, DECEASED.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

HARRISON GEER,

Attorney for Plaintiff in Error.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
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REPLY BRIEF FOR PLAINTIFF IN ERROR.

In our original brief, we anticipated and answered the argument which is made by counsel for defendant in error (Mr. Campbell) in his brief. It is therefore unnecessary for us to make an extensive reply. There are some misstatements and other matters, however, in his brief to which we wish to call attention.

On page 2 of his brief, he states that "the sole question for determination by this court is whether the decree against the Michigan exectuors, who did not appear in the cause and who were not served with process within the State of Massachusetts, is binding upon the Estate of Fletcher in Michigan." If by this statement counsel means that the sole question for determination is whether that part of the decree of the Supreme Judicial Court, in Equity, for Suffolk County, which runs against the Michigan executors is binding upon the Estate of Fletcher in Michigan, we take issue with him. Our associate counsel argues in his brief that that part of the decree which runs against the Michigan executors is binding upon the Estate of Fletcher in Michigan, but it is our contention, further, that that part of the decree which con-

firms the award of the arbitrator (R., p. 148), by which he found that the "Estate of George N. Fletcher" was indebted to Albert W. Brown, administrator *de bonis non*, and to Albert W. Brown, executor (R., pp. 118-120), is binding upon the Estate of Fletcher in Michigan, and further, that that part of the decree which runs against the administrator with the will annexed is binding upon the Estate of Fletcher in Michigan, for the reasons stated on page 15 of our original brief. In other words, the statement of the question for determination by counsel for defendant in error is too narrow.

On page 17 of his brief, counsel for defendant in error states that "when Fletcher died the facts were still undetermined (by the arbitrator) and the hearings continued before the arbitrator for more than three years before the facts were finally determined by him and his award filed." The preliminary award of the arbitrator by which he found Fletcher liable to account, and determined the manner in which the extent of his liability should be ascertained, was filed May 22nd, 1894 (R., p. 78), more than five years before Fletcher's death. All that remained to be done, as we stated in our original brief (p. 17), was to determine the extent of his liability. The hearings did not continue before the arbitrator for three years for the purpose of determining the facts, but that time was consumed in reviving the suit against the administrator with the will annexed and in the proceedings to bring in the Michigan executors and the children and residuary legatees of Fletcher.

On page 19 of his brief, counsel for defendant in error states that after the revival of the suit against him, the administrator with the will annexed "consented to all subsequent proceedings." The exemplification of the record does not show that he consented to any of the subsequent proceedings. When the petition was filed for leave to bring in the Michigan executors and the children and residuary legatees of Fletcher, counsel for the administrator with the will annexed endorsed on the petition that he had no objection to its being granted (R., p. 87). Would counsel for defendant in error have had him object to the giving of this opportunity to appear and defend the suit to the Michigan executors and the children and residuary legatees? The final award of the arbitrator recites that the administrator with the will annexed appeared personally before him (R., p. 117), but

it does not state that he consented to anything. The final decree of the Supreme Judicial Court in Equity for Suffolk County does not show that the administrator with the will annexed consented to anything. We therefore insist that there is no justification for counsel's statement. As we said in our original brief (p. 83), what could the administrator with the will annexed do that he did not do? Fletcher had been found liable and the arbitrator was about to determine the extent of his liability. The administrator with the will annexed could not undo what had been done.

Counsel for defendant in error refers in his brief (p. 30) to the opinion of Judge Putnam in the case of Ingersoll vs. Coram, 127 Fed., 418. Judge Putnam's decision was reversed by the Circuit Court of Appeals for the First Circuit,—148 Fed., 169. However, that case is not applicable to the case at bar. Col. Rob't G. Ingersoll's widow, as his New York administratrix, Ingersoll having died intestate,commenced an action in Montana against certain heirs of one Davis to recover for professional services rendered in a will contest. Shortly after the commencement of the suit one Harris, Ingersoll's Montana administrator, was substituted as plaintiff in the suit, which proceeded to judgment against him, and this judgment was affirmed by the Supreme Court of that State. The widow, who had also been appointed ancillary administratrix in Massachusetts, then commenced suit in the Federal Circuit Court for the District of Massachusetts against the same defendants upon the same alleged cause of action. Judge Putnam held, 127 Fed, 418, 132 Fed. 168, 136 Fed. 689, that there was no privity between the Montana administrator and the Massachusetts administratrix, and therefore that the action could be maintained. The Court of Appeals, in reversing his decision, held, that while there was no privity between them, the cause of action having a situs in every jurisdiction where an administrator was appointed, and the Montana administrator having commenced suit to reduce the cause of action to judgment, the judgment of the Montana court was a bar to the suit in the Massachusetts Federal Court. It is therefore clear that that case aids neither party to the case at bar.

The brief of counsel for defendant in error absolutely ignores, as did the opinion of the Supreme Court of Michigan, the first proposition argued by us in our orig-

inal brief (pp. 15-16). Counsel contents himself with the statement (p. 32) that "no reason is pointed out" for the distinction which we contend should be recognized between suits, pending at the time of the death of the intestate or testator, which are revived against his administrator or administrator with the will annexed, and suits which are commenced against an administrator or administrator with the will annexed. That there is an important distinction, we believe we have demonstrated in our original brief (pp. 17-62). Counsel brushes aside the case of Creighton vs. Murphy, 8 Nebr., 349, with the statement that it is only the "*ipse dixit* of the Nebraska judge who rendered the opinion." That is an easy way of disposing of a case which is contrary to what counsel would like to have the law determined to be, but we are confident that we have shown in our original brief (pp. 35-7) that that case is sound in principle.

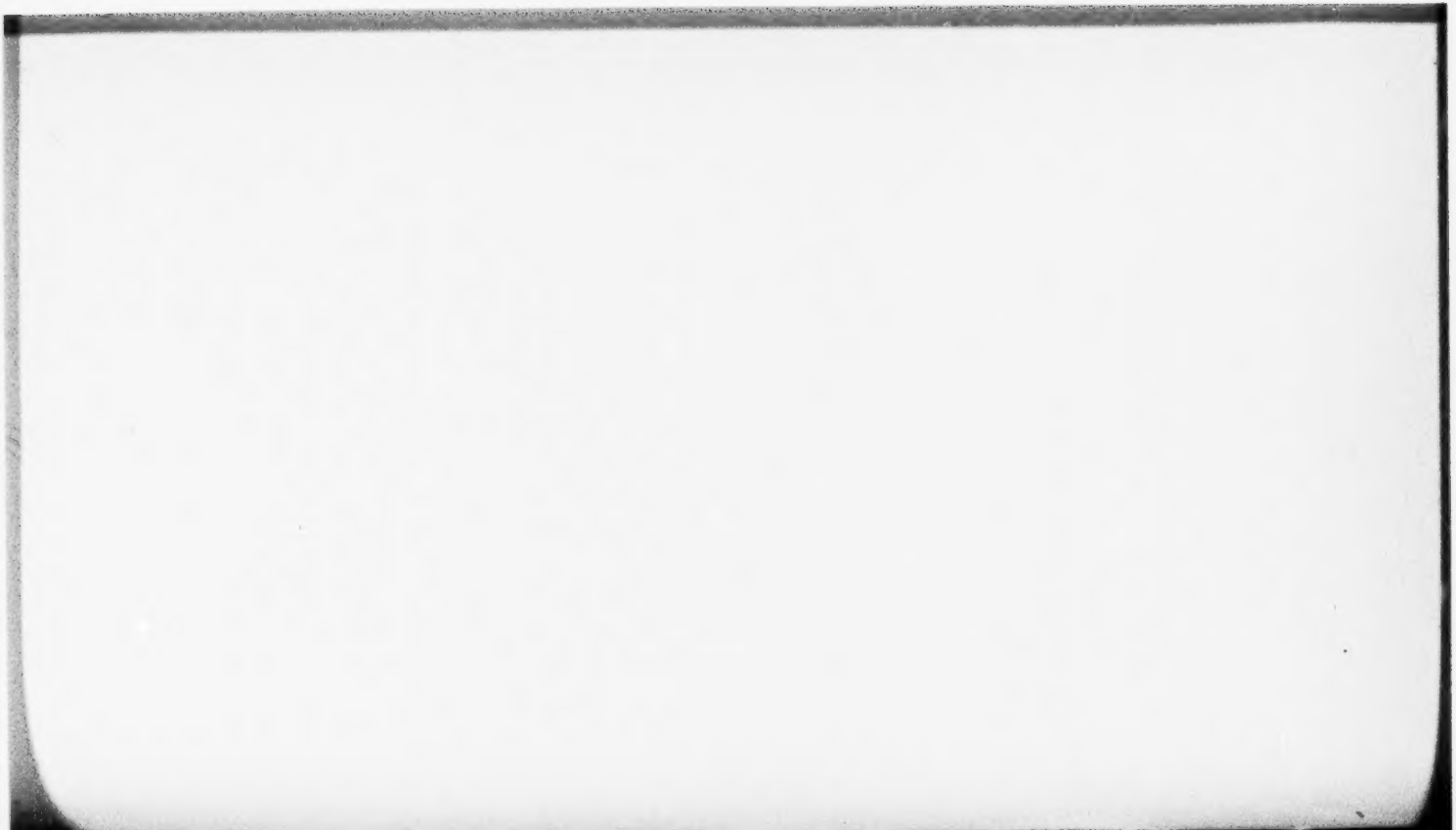
The attitude of counsel for defendant in error towards the case of Creighton vs. Murphy, and towards the distinction between cases where suits are commenced against an administrator and cases where suits, pending at the time of the death of the intestate, are revived against his administrator, is characteristic of his attitude in this case. By a process of elimination, the ignoring of every proposition advanced by us which is contrary to what counsel would like to have the law determined to be, and the eliminating of all facts and questions which stand in the way of such determination, the Michigan courts reached the conclusion, and counsel now argues, that the position of defendant in error is well taken. We feel confident that this court will not thus lightly brush aside questions of such importance to the plaintiff in error.

Counsel for defendant in error has made no mention in his brief of the question whether the decree was properly made in favor of Albert W. Brown, individually. While we discussed this question in our original brief (pp. 91-94), it was on the assumption that the defendant in error would insist upon it in this court. However, we may now conclude that that objection has been abandoned by defendant in error, and that this court will not be called upon to consider it.

We are aware that our briefs in this case are som what long, but the fact that the Michigan courts misstated our position, and gave no consideration to our first proposi-

tion, must be our excuse. We have felt it to be our duty to make our briefs so elaborate that this court, when it reads them, will at once comprehend the questions presented. When these questions are fully considered by this court, we know that justice will be done.

HARRISON GEER,
Attorney for Plaintiff in Error.



FILED
MAR 28 1908
JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM 1907.

No. 220

ALBERT W. BROWN, PLAINTIFF IN ERROR,

vs.

THE ESTATE OF GEORGE N. FLETCHER, DECEASED, DEFENDANT IN ERROR.

BRIEF OF HENRY M. CAMPBELL,
Counsel for Defendant in Error.

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THE ESTATE OF GEORGE N. FLETCHER, DECEASED, DEFENDANT IN ERROR.

BRIEF OF HENRY M. CAMPBELL,
Counsel for Defendant in Error.

The question presented to this court by the present appeal arises under Art. IV, Sec. 1, of the Federal Constitution, respecting a claim submitted to the Commissioners on Claims appointed by the Probate Court for the County of Wayne, State of Michigan, by Albert W. Brown, a citizen and resident of Massachusetts, against the Estate of George N. Fletcher, a citizen of the State of Michigan, domiciled at the time of his death in that State. The claim is based solely upon a decree rendered by the Supreme Judicial Court of Suffolk County, Massachusetts, which, in form, runs against the administrator with the will annexed of said Fletcher, appointed by the Probate Court for the County of Middlesex, Massachusetts, against Frank W. Fletcher and Allan M. Fletcher, executors of the last will of George N. Fletcher, deceased, holding letters testamentary issued by the Probate Court for the County of Wayne, Michigan, and against Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, also citizens and residents of the State of Michigan.

The sole question for determination by this court is, whether the decree against the Michigan executors, who did not appear in the cause and who were not served with process within the State of Massachusetts, is binding upon the Estate of Fletcher in Michigan.

The claim was disallowed by the Commissioners on Claims appointed by the Probate Court for the County of Wayne, State of Michigan. This decision was affirmed on appeal to the Circuit Court, and in turn was affirmed by the Supreme Court of the State.

Brown vs. Fletcher's Estate, 146 *Mich.*, 401.

STATEMENT OF FACTS.

The following statement of facts is taken from the opinion of the Supreme Court of Michigan:

> George N. Fletcher, a citizen of Michigan, domiciled at Detroit, Michigan, died at Detroit November 5, 1899. By his last will, dated December 6, 1884, he nominated his wife and his two sons and the survivors of them his executors. The will disposes of his entire estate, was admitted to probate in Wayne county, Michigan, December 5, 1899, and the sons were appointed to administer the property. In due course of such administration, a claim against the estate was presented to the commisioners on claims, was by them disallowed, and, upon appeal to the Circuit Court for the county of Wayne, the case coming on to be heard before the court and a jury, the claimant to maintain the issue on his part, introduced in evidence:
>
> 1. The claim presented before the commissioners on claims, hereinafter set out.
>
> 2. A duly certified copy of the record of the cause of Rufus H. Spalding, administrator of the estate of William White, deceased, complainant, vs. George N. Fletcher, James Campbell and Eliza White, defendants, in the Supreme Judicial Court of the commonwealth of Massachussets.
>
> 3. A duly certified copy of the proceedings of the Probate Court of Middlesex county, Massachusetts, in the matter of the estate of George N. Fletcher in that state consisting of the peti-

tion for the appointment of an administrator with the will annexed, the notice, the appointment of an administrator with the will annexed, the bond of the administrator, the inventory of the estate, petition for leave to sell real estate, order allowing the sale of real estate and final account of the administrator with the will annexed.

4. A duly certified copy of the appointment by the Probate Court of Suffolk county, Massachusetts, on December 26, 1902, of Albert W. Brown, as administrator de bonis non of the estate of William White, deceased.

5. A duly certified copy of the appointment by the Probate Court of Wayne county, on November 2, 1903, of Albert W. Brown, as executor of the last will and testament of Frances M. Brown, deceased, including a copy of the will of Frances M. Brown.

6. A duly certified copy of the appointment by the Probate Court of Alpena county, Michigan, on March 15, 1904, of Albert W. Brown, as administrator de bonis non of the estate of William White, deceased.

7. The revised laws of Massachusetts of the issue of 1902.

8. The will of George N. Fletcher, which was probated in Wayne county, and the letters testamentary issued by said court on December 5, 1899, to Frank W. Fletcher and Allan M. Fletcher, as executors thereof; also the inventory of the estate filed in said court on December 7, 1900, showing total assets amounting to $575,809.02.

Claimant sworn as a witness in his own behalf, testified that there were no debts against the estates of William White or of Frances M. Brown in Michigan nor in Massachusetts; that he was administrator de bonis non of the estate of White and executor of the last will of Frances M. Brown.

To maintain and prove the issue on its part, the estate of George N. Fletcher introduced the following evidence:

1. Against the objection and exception of the claimant that the record speaks for itself and that the clerk can only certify as to what is in the record, a certificate of the clerk of the Supreme

Judicial Court of Massachusetts, showing that there were no appearances in that court on behalf of the defendant estate after the death of George N. Fletcher on November 5, 1899, except the appearance of the administrator with the will annexed.

2. Against the objection and exception of the claimant on the same ground, a certificate showing the docket entries in the cause after the death of George N. Fletcher.

All of the testimony and evidence so offered was received, and thereupon counsel for the claimant moved the court to direct the jury to render a verdict in his favor for the amount due him under the decree offered in evidence, which motion the court then and there overruled, and counsel for the claimant excepted to the action of the court in so doing. Counsel for the defendant estate moved the court to direct the jury to render a verdict in favor of said estate, disallowing the claim of the claimant, which motion was granted. Counsel for claimant duly excepted to the action of the court in granting the motion of counsel for defendant estate. The jury, under the instructions of the court, rendered a verdict in favor of the defendant estate. Afterwards, and on September 9, 1905, judgment was entered on the verdict. A motion for a new trial having been made, it was denied. The grounds of the motion were that the court had, in directing a verdict and in entering judgment for the defendant estate, failed to give full faith and credit to the records and judicial proceedings of the Supreme Judicial Court, in equity, for the county of Suffolk, Massachusetts, in accordance with (1) Article 4, Sec. 1, of the Constitution of the United States; (2) with Sec. 905 of the Revised Statutes of the United States. Claimant has brought the record of the proceedings into this court by writ of error, assigning as error the refusal of the court to direct a verdict for claimant, the directed verdict, failure of the court to give full faith and credit to the records of judicial proceedings of the Massachusetts court, and the denial of the motion to set aside the verdict and judgment and grant a new trial.

The claim which is in question is formally stated as follows:

"To Frederick W. Whiting and Charles A. Rathbone, commissioners on claims in said matter:

Gentlemen:—You are hereby notified that Albert W. Brown is a creditor of said estate in the sum of four hundred and four thousand, two hundred and fifty-four dollars and twelve cents ($404,254.12), and interest thereon at the rate of six (6) per cent per annum, from the fourteenth day of April, 1903.

Said claim is based upon the final decree of the Supreme Judicial Court for the Commonwealth of Massachusetts entered on the fourteenth day of April, 1903, and which decree was entered in a suit in said court to which the said George N. Fletcher, deceased, in his lifetime, was a party defendant, and which decree purports to and does bind the estate of the said decedent to the payment of the full amount decreed to be paid, as aforesaid, under its provisions.

A copy of the said decree and the proceedings in said suit, duly certified and attested under the act of Congress and the law of this state, is ready to be procured and proved before you as the commissioners on claims in said estate, and the said claimant, Albert W. Brown, does and will claim for the said decree when produced and proven according to law, the same full force, faith and credit to which the same is entitled under the laws of the said Commonwealth of Massachusetts, within the State of Michigan, against the estate of said George N. Fletcher, deceased.

The said Albert W. Brown therefore demands and claims against the estate of the said George N. Fletcher, deceased, the full sum of $404,254.12, with interest thereon at the rate of six (6) per cent per annum from the 14th day of April, 1903.

You are also notified, that the said claimant is now ready to present and prove his said claim without delay, and you are respectfully requested to fix an early date for the hearing thereof in accordance with the statute in such case made and provided.

Dated, April 6th, 1904.

ALBERT W. BROWN,

By John Miner, His Attorney."

The documentary evidence of the claimant consists of the record and files in a certain judicial proceeding which eventuated in a decree of the Supreme Judicial Court, in equity, for the county of Suffolk, Massachusetts, confirming, in favor of the claimant and appellant, certain awards of an arbitrator or referee and concluding as follows:

"And it is further ordered, adjudged and decreed that Frank B. Cotton, as he is the administrator with the will annexed de bonis non of the estate of the said George N. Fletcher, deceased, be, and he is hereby ordered and directed to pay to Albert W. Brown, the now plaintiff in this suit in accordance with said final award the full sum of three hundred and ninety-four thousand, three hundred and seventy-two dollars and eighty-seven cents ($394,372.87-100) awarded to be paid by the final award of the said William L. Putnam, with interest thereon from the fifth day of February, in the year nineteen hundred and three, the date of the filing of said final award, at the rate of six per cent per annum, amounting at the date of entry of this decree to the sum of four thousand and four hundred and ninety-five dollars and eighty-five cents ($4,495.85-100); together with the costs of this suit to be taxed herein, with interest upon the whole sum thereof at the rate of six per cent per annum from the date of the entry of this decree.

And it is further ordered, adjudged and decreed, for the purpose of enabling the plaintiff to enforce the covenants of said submission, that the executors of the last will and testament of the said George N. Fletcher are bound to abide by and perform the final award of the said William L. Putnam, and are liable to pay unto the said Albert W. Brown, the now plaintiff in this suit, in accordance with said final award, the full sum of three hundred and ninety-four thousand, three hundred and seventy-two dollars and eighty-seven cents ($394,372.87-100) awarded to be paid by the final award of the said William L. Putnam, with interest thereon from the fifth day of February, in the year nineteen hundred and three, the date of the filing of said award, at the rate of six per cent per annum, amounting at the date of the entry of this decree to the sum of four thousand four

hundred and ninety-five dollars and eighty-five cents ($4,495.85-100), together with the costs of this suit to be taxed herein, with interest upon the whole sum thereof at the rate of six per cent per annum from the date of the entry of this decree.

And it is further ordered, adjudged and decreed, for the purpose of enabling the plaintiff to enforce the covenants of said submission, that the said Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, as the legal representatives of the said George N. Fletcher, deceased, are bound to abide by and perform the final award of the said William L. Putnam, and are liable to pay unto the said Albert W. Brown, the now plaintiff, such part of the full sum of three hundred and ninety-four thousand, three hundred and seventy-two dollars and eighty-seven cents ($394,372.87-100), awarded to be paid by the final award of the said William L. Putnam, with interest thereon from the fifth day of February, in the year nineteen hundred and three, the date of the filing of said final award, at the rate of six per cent per annum, amounting at the date of the entry of this decree to the sum of four thousand and four hundred and ninety-five dollars and eighty-five cents ($4,495.85-100), together with the costs of this suit to be taxed herein, with interest upon the whole sum thereof at the rate of six per cent per annum from the date of the entry of this decree, as may be unsatisfied after applying such part of the estate of the said George N. Fletcher, deceased, as may remain undistributed in the hands of the said administrator or executors of his said last will and testament.

And the court doth further order, adjudge and decree that the plaintiff in this suit do recover all of his costs in this suit to be taxed by the clerk in accordance with the rules and practice of this court.

And it is further ordered, adjudged and decreed that the bill of complaint in this cause and all proceedings thereunder be and the same is hereby dismissed as to the defendants, James Campbell and Eliza White."

The suit in which this decree was made was begun in April, 1874. Process was personally served within the jurisdiction of the court upon each de-

fendant, and each appeared and filed an answer. There was a reference to a master to take testimony and report the facts and state accounts. He filed a report in which he set forth the facts found by him, but he did not state the account between the parties. The matter was again committed to the master to determine certain stated issues, and he again made a report. It was April 15, 1891, when this point in the proceedings was reached. In April, 1892, the exceptions to the report not having been brought on for argument, an agreement was made and was reduced to writing, which is here set out.

"Said complainant, Rufus H. Spalding, and said defendant, George N. Fletcher, and Frances M. Brown, who has been made a party to said suit, agree to submit to the arbitration of Hon. William C. Endicott, of Salem, Massachusetts, all the claims and demands set forth in said suit, and all other claims and demands which either party may have against the other; and especially all claims and demands which said Spalding as administrator may have, or which the estate of his intestate may have, against said Fletcher, and all claims which the said Fletcher may have against said Spalding as administrator, or against said estate, whether represented by said Spalding, or by any successor in the administration of said estate, and all claims which the said Frances M. Brown may have against said Fletcher, or that said Fletcher may have against said Frances M. Brown.

And the said George N. Fletcher and the said Frances M. Brown, each respectively, covenant, promise and agree, to and with each other, for themselves and their respective heirs, executors and administrators that they will abide by and faithfully perform and fulfill all the terms and conditions of any award which may be made by said arbitrator, or by any substitute or successor as hereinafter provided; and said George N. Fletcher, for himself and his heirs, executors and administrators, and said Rufus H. Spalding for himself and for the estate which he represents, covenants, promises and agrees, each to and with the other as follows:

The said Fletcher covenants, promises, and agrees that he will and his heirs, executors and administrators shall faithfully fulfill and perform

all the terms and conditions of any award which may be made by said arbitrator, or his substitute or successor as aforesaid, for the doing of any act or the payment of any sum of money which said arbitrator may award that he shall do or pay to said Spalding, as administrator of the estate of said White, and that he will and his heirs, executors and administrators shall likewise perform and pay any such award to any successor of said Spalding in the administration of said estate, and said Spalding covenants, for himself and his successors, not personally but as an obligation of the estate, that said estate shall perform and fulfill any award and pay any sum which said arbitrator shall award to be paid by said estate to said Fletcher; and said Frances M. Brown covenants, promises and agrees to and with said Fletcher that if said Spalding shall decease, or be removed from the administration of said estate, his successor shall well and truly abide by and perform all the terms and conditions of any award made by said arbitrator, or his substitute or successor as aforesaid, which are to be performed and fulfilled by said estate, or by its administrator to said Fletcher; it being the intention of this submission to forever settle all controversies between all said parties, and that the decease of any party shall not revoke said submission, but that said arbitration shall continue, and that the successors of said Spalding, and the legal representatives of said Brown and said Fletcher, shall be bound by the final award therein.

And it is further agreed by the said parties that if said arbitrator shall decease, or shall become incapacitated to act as arbitrator, then in that case the parties shall agree upon an arbitrator, who shall take his place, with all the power and authority herein submitted to the arbitrator herein named, and if the parties shall fail to agree to make such appointment within thirty days from the decease or incapacity of said arbitrator, either party may apply to any Judge of the Supreme Court to appoint an arbitrator in the place of the arbitrator hereby appointed, who shall have all the powers and authority vested in the arbitrator herein named.

And it is further agreed that all the evidence hereinbefore taken in said cause, either under the commissions appointed by the court, or before the Master appointed in said cause, and the reports of said Master, shall be submitted to said arbitrator, but the reports shall not have the same force and effect as the same would have had and received in a hearing before said Court, but they shall have only such force and effect, if any, as the arbitrator may see fit to give them, it being agreed that a judgment of the arbitrator shall be final upon all the questions of law and fact, except as hereinafter provided, and that any of said evidence which may be regarded by said arbitrator as inadmissible or incompetent, may be rejected by him.

And it is agreed that in the hearing of the questions submitted to the arbitrator he shall first pass upon the general question of liability or nonliability and announce his decision without taking any additional evidence; and in case he shall decide that a liability exists the parties shall have a reasonable time to produce evidence and determine the amount of said liability. And when the final award shall be made by said arbitrator, either party may apply to said court for a decree to enforce the same, or the same may be enforced by a decree or judgment in any other court, having jurisdiction of the parties. And the prevailing party shall be entitled to have a decree or judgment entered in any court having jurisdiction over the party against whom such award may be made, in conformity with the award so made, as a judgment entered by consent which is hereby given.

Upon the final report of the arbitrator any questions of law except those arising upon the admissibility and weight of the evidence shall be reserved for the decision of the court, upon the request of either party, and in this connection the statutes and decisions of Michigan shall be admissible without other proof than the recognized books of statutes and reports and any question arising thereon shall be treated as a question of law and not of fact.

The submission is to be made under a rule of this court and not to operate as a discontinuance of said suit.

In witness whereof the parties hereto have set their hands and seals, this fourth day of April, 1892.

Signed,

Geo. N. Fletcher, (Seal)
Frances M. Brown, (Seal)
Rufus H. Spalding. (Seal)
Administrator."

The Hon. William L. Putnam, then and now judge of the Circuit Court of the United States for the first circuit, was finally selected by the parties as arbitrator and was, by a consent order, appointed by the court. In April, 1894, he filed a preliminary award, in which he adjudged that defendant Fletcher was liable as trustee to the other parties to the reference and directed and awarded an accounting, as such trustee, by Fletcher. Thereafter, he proceeded to determine the amount due to Frances M. Brown as administratrix and as heir of White. Defendant Fletcher appeared before the arbitrator personally and by attorney, but died before the accounting was completed and the second and final award made. His death was suggested of record, and in accordance with the laws of the state of Massachusetts, decedent having some estate in that jurisdiction, the suit was revived against Frank B. Cotton, who had been appointed by the local authority, upon the petition of complainant, administrator with the will annexed of his (Fletcher's) Massachusetts estate. The Michigan executors of the will of Fletcher were requested to come in and defend the suit. Upon their refusal so to do, the complainant filed a petition in the Massachusetts court setting up the proceedings had in that court, the stipulation or agreement for arbitration, the death of Fletcher and the probate of his will in Michigan, the names of his heirs and his executors; that the estate in Massachusetts was not valued at more than one thousand dollars and that

"Your petitioner further represents, that the said executors, although requested so to do, failed to come into or to be represented in this cause, but declined and refused to further regard the proceedings therein as having any binding effect upon them or the estate which they held as such execu-

tors in Michigan or elsewhere outside of this commonwealth, and your petitioner shows, that the counsel who appeared for and represented the defendant George N. Fletcher in his life time in this suit, caused his appearence as such counsel to be withdrawn, on, to-wit, the 1st day of May, 1900.

* * * *

"Your petitioner is advised and therefore submits, that, in order that this court may regularly make and enter a valid decree in this cause, which will be personally binding and conclusive upon the said heirs at law of the said defendant, George N. Fletcher, it is necessary that the said Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher personally be made parties defendant to this suit. * * *

"Your petitioner therefore prays, that an order or decree of this court may be entered in said cause, specifying and declaring as follows: First. That Frank W. Fletcher and Allan M. Fletcher, the executors of the last will and testament of the deceased George N. Fletcher as aforesaid, and the said Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, the children and legal representatives of the said deceased George N. Fletcher, may be summoned in to defend this suit, in order the the cause may proceed to a final decree as contemplated by the covenant of submission of the parties to said cause, hereinbefore referred to. Second. That all necessary amendments to the pleadings in this cause may be made by either party, pursuant to the stipulation of the parties to that effect, already on file in this cause. Third. That the court may make such other and further or different orders and decrees in the premises as shall be agreeable to equity and the rights of the parties respectively."

Upon this petition, the court made the following order:

"On the petition of Frances M. Brown, now plaintiff in said cause for the summoning of additional parties to defend this suit, filed October 2nd, 1901.

"It appearing to the court that upon an agreement of submission and reference between the defendant George N. Fletcher, during his life, and the plaintiff, dated April 4, 1892, and by a rule

of this court, dated October 18, 1893, this cause was referred to the determination of William L. Putnam, and

"It further appearing that during the lifetime of the said George N. Fletcher a report was made by said referee to this court that the plaintiff was entitled to an account, and thereupon hearings were had as to the amount due upon such accounting, and while said hearings were in process the said defendant George N. Fletcher died, and that said George N. Fletcher was resident of Michigan and left three children, Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, and the last will and testament in which said Frank W. Fletcher and Allan M. Fletcher were named as executors, has been probated in said Michigan, said executors have been duly qualified and that by said will and testament the said three children are residuary legatees and devisees of the said defendant George Fletcher, and

"It further appearing that in the said agreement of submission and reference the said George N. Fletcher covenanted for his heirs, and representatives that he would and his heirs, executors and administrators should faithfully fulfill and perform all the terms and conditions of any award which may be made by such arbitrator or his substitute or successors, and it was covenanted by all the parties to said agreement of submission and reference that said agreement of submission and reference should forever settle all controversies between all of said parties and that the decease of any party should not revoke said agreement of submission but that said arbitration should continue and the successors of said Spalding and the legal representatives of said Brown and said Fletcher should be bound by the final award therein, and

"It further appearing by said agreement of submission and reference that when the final award should be made by said arbitrator either party might apply to the court for a decree to enforce the same, and the same might be enforced by a decree or judgment in any other court having jurisdiction of the parties, and that the prevailing party should be entitled to have a decree or judgment entered in the court having jurisdiction over the parties against whom such award might

be made in conformity with the award so made as a judgment entered by consent which was thereby given, and

"It further appearing that by the terms of the rule referring the said cause to the said William L. Putnam, it was provided that if either party neglected to appear on due notice then the reference to proceed ex parte, and

"It also appearing to the court that the counsel of record who represented said George N. Fletcher during his lifetime had withdrawn their appearance and no appearance had been since entered for his children or legal representatives except that an administrator with the will annexed had been appointed in the State of Massachusetts who has appeared and who has not objected to the granting of this petition, and

"It further appearing in order that the hearings before said arbitrator may properly proceed and final decree be entered in this cause as contemplated by the said agreement of submission and reference that the said children of the said George N. Fletcher and his executors should be summoned in to defend this suit.

"It is ordered that the said Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, children of the said George N. Fletcher and the said Frank W. Fletcher and Allan M. Fletcher, executors of the last will and testament of the said deceased George N. Fletcher, have until one month from the first Monday of October current, being the rule day next succeeding the date of this order to appear in said cause, and upon default of appearance by that date that this cause proceed before the arbitrator ex parte as to such parties."

And copies were duly served upon the heirs and executors in Michigan. They did not appear, their default was entered, and the accounting proceeded. The arbitrator filed his final award February 5, 1903. The estate of Mr. Fletcher, in Massachusetts, was found to be exhausted and wholly insolvent, nothing being realized therefrom in reduction of the amount of the decree.

The validity of those provisions of the decree which in terms affect the heirs of the decedent Fletcher with respect to a possible deficiency of the assets in the control of the executors, is not asserted.

ARGUMENT.

I.

The character of the suit against Fletcher was not changed by the agreement of submission under rule of court. The agreement had no independent efficacy, but was only a step in the cause. Any award made under it was not final. A decree was necessary to constitute a final adjudication.

The Supreme Judicial Court of Suffolk County, Massachusetts, is a court of general equity jurisdiction, and proceedings before it are conducted in accordance with the generally accepted rules of equity practice. The proceeding by submission to a referee or arbitrator, under rule of court, while not known to the practice in the State of Michigan, is one of the methods recognized in general equity practice for inquiring into facts bearing upon questions litigated before the court, and does not differ materially from a reference to a master. The award even as to the facts found is not removed from the control of the court to which the award is submitted, and the questions of law applicable to the facts also remain with the court for final determination.

In the case under consideration, the articles of submission expressly provide that questions of law shall be reserved for the court, so that according to the terms of the articles themselves the award standing alone could have no finality.

The practice is not regulated by statute, but is governed by the general rules of equity practice, as declared by the courts. The reference is only one of the steps in the cause looking to a final judgment by the court in which the proceeding is had, and the authority of the referee or arbitrator is derived not from the agreement of submission, but from the court.

> "The agreement of submission is not a mere agreement collateral to the action, but a mode of deciding the question in controversy in the action, like the verdict of a jury, so that the court may enter judgment thereon according to the justice of the case. It is somewhat like reference to an officer

of the court to tax costs or assess damages under the direction of the court; * * * By such an agreement the parties put themselves on trial before the court and neither party has any more right to stop the progress of the trial than if it were a trial before a jury."

Haskell vs. Whitney, 12 *Mass.,* 49.

"The award offered by the defendants constitutes no bar to the present action. It settles nothing conclusively between the parties. It is still open to revision by the court to which it was returned and may be set aside or adjudged void for any good cause. It can have no greater effect than the verdict of a jury."

Todd vs. Old Colony & F. R. R. Co., 3 *Allen,* 18.

"The authority of referees to determine a cause pending in court, so that their award shall have the effect of a verdict and be the basis of a judgment, is derived, not from the assent of the parties, but from the court by which they are appointed. The parties cannot by their own act merely empower persons in the country to make an award which shall be binding upon the court where the action is pending. The submission under rule of court takes force, effect and validity from the action of the court sanctioning the previous agreement of the parties"

Woodbury vs. Proctor, 9 *Gray,* 19.
Searey vs. Beckler, 132 *Mass.,* 203.

"When a cause has been referred to arbitration by a rule of court, neither party can rescind the rule without an order of the court. The case remains upon the docket, cannot be finally disposed of without a judgment of the court, and is meanwhile subject to the control and order of the court upon the motion of either party, and upon reasonable notice to the opposing counsel."

Wylie vs. Dergan, 118 *Mass.,* 64-70.

It may be shown that the arbitrator refused to pass upon a claim submitted.

Gaylord vs. Norton, 130 *Mass.,* 74.

Or that there was no evidence to support the award.

Boston Belting Co. vs. Boston, 149 *Mass.,* 44.

The articles of submission themselves expressly provided as follows:

> "Upon the final report of the arbitrator any questions of law, except those arising upon the admissibility and weight of the evidence shall be reserved for the decision of the court upon the request of either party, and in this connection the statutes and decisions of Michigan shall be admissible without other proof than the recognized books of statutes and reports, and any question arising thereon shall be treated as a question of law and not of fact.
>
> The submission is to be made under a rule of this court and not to operate as a discontinuance of said suit." (R., 53.)

It is clear, therefore, that any award made by the arbitrator could not be final, but that a decree was necessary to final adjudication. *Moreover when Fletcher died the facts were still undetermined and the hearings continued before the arbitrator for more than three years before the facts were finally determined by him and his award filed.*

In the States where this practice prevails, including Massachusetts, it is universally held that the death of the party does not revoke the submission; thus placing the submission upon the same plane as a reference to a master; that the death may be suggested of record and the cause revived against such persons as the court may be able to bring within its jurisdiction.

> *Bacon vs. Crandon*, 15 *Pickering*, 79.
> *Freeborn vs. Burnan*, 8 *N. J. Law.*, 116.
> *Moore vs. Webb.*, 6 *Heiskell (Tenn.)*, 301.
> *Ruston vs. Dunwood*, 1 *Binn. Pa.*, 42.
> *Wheatley vs. Martin's Admr.*, 6 *Leight (Virginia)*, 62.

The question then is, against whom could the suit pending against Fletcher be effectively revived?

II.

The death of Fletcher abated the suit, and thereafter it could only be revived against such persons as were subject to the jurisdiction of the court and were lawfully brought before it.

In the absence of statute, death, at the common law, terminated a suit. In equity it was held that the suit was suspended until revived against the new parties interested. This was accomplished by a bill of revivor, upon the filing of which, process issued as in the case of an original bill, and service of such process within the jurisdiction was necessary to bring the new parties before the court.

2 *Daniel's Ch. Pr.*, 1508.
Story Eq. Pl., Sec. 364.
1 *Cyc.*, 101, 116.

In modern times the method of reviving suits, both at law and in equity, is generally regulated by statute, and in all cases provision is made for process to bring the new parties within the jurisdiction of the court.

In Massachusetts the subject of the revival of suits having been regulated by law, the rules applicable thereto must be found in the statutes. No other methods than those prescribed are permissible and no revival can be had against any other persons than those therein designated.

The provisions of the statutes of that state on this subject are found in Chap. 171, Revised Laws of Massachusetts, 1902, and are as follows:

"SECTION 5. If the sole plaintiff or defendant in a personal action, the cause of which survives, dies before the entry thereof, or of an appeal from a judgment rendered therein, the action or appeal may be entered and his death suggested upon the record. After the entry of such action or appeal and of the suggestion of his death as aforesaid, his executors or administrators may, within such time as the court or trial justice allows, appear and prosecute or defend, in the same manner *as if the action had been commenced by or against him.* If he does not voluntarily appear, the court or trial justice before whom the action is pending shall, upon motion of the surviving party, cite him to appear and prosecute or defend it.

"SECTION 6. Such citation shall be returnable at such time as the court or trial justice may order, *and shall be served fourteen days at least before the return day.*

"SECTION 7. If the executor or administrator does not appear on the return of the citation, or within such further time as the court or trial justice may allow, he shall be non-suited or defaulted, and judgment rendered against him in like manner as if the action had been commenced by or against him in his said capacity, except that he shall not be personally liable for costs, *but the estate of the deceased in his hands, shall be liable for the costs, as well as for the debts or damages.*"

"SECTION 17. If a party to a suit in equity dies, and the cause, by the rules of equity, may be revived against or in favor of an executor, administrator, heir, devisee or other person, such representative may, in lieu of proceedings to revive the same, appear to be summoned to prosecute in like manner as in an action at law."

After the death of Fletcher, the complainant, on the ground of being a creditor of Fletcher's, caused Frank B. Cotton to be appointed administrator with the will annexed, of his estate. This proceeding was regular, as Fletcher possessed property in Massachusetts subject to administration, and conferred upon such administrator the control of Fletcher's property within that State.

Complainant then suggested the death of Fletcher upon the record of the pending suit, and revived the same against Cotton, who promptly appeared and who thereafter consented to all subsequent proceedings. This proceeding was also in accordance with the statutes, and the decree which was finally entered against Cotton was unquestionably binding upon the estate in his hands.

Complainant went further, however, and also named as defendant in the revived suit, Frank W. Fletcher and Allan M. Fletcher, executors, holding letters testamentary from the Probate Court for the County of Wayne, State of Michigan, and also Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, children and heirs-at-law, residents and citizens of the State of Michigan; and on the petition of complainant the court entered an order for their appearance "in order that the hearings before the arbitrator may properly proceed and final decree be entered in this cause, as contemplated by the said agreement of submission and reference" (R., 89). Copies of this order were served upon the executors and heirs in the State of Michigan. They did not appear; their defaults were entered; and the accounting proceeded.

The final award was filed by the arbitrator February 5, 1903, three years and three months after the death of Fletcher; and upon April 14, 1903, the final decree was entered, in which it was ordered, adjudged and decreed:

(1) That Frank B. Cotton, administrator, etc., pay to the then complainant the full sum of the final award, with interest and costs aggregating $404,254.12.

(2) That Frank W. Fletcher and Allan M. Fletcher, executors, are liable to pay the full amount of the final award.

(3) That Frank W. Fletcher, Allan M. Fletcher and Grace Fletcher, "as the legal representatives of the said George N. Fletcher, deceased," are liable to pay such part of the full amount of the final award as may be unsatisfied after applying the estate of the deceased in the hands of his administrator and executors.

The decree recites that "due and sufficient service" had been made of the order requiring the executors and individual defendants to appear (R, 147), but it is conceded that the only service upon them was in the State of Michigan.

It is clear that the executors and administrators against whom the Massachusetts laws authorize suits to be revived are only such executors and administrators as are appointed under the laws of that State. They are the only persons over whom the State can exercise any authority, and it is not to be presumed that the legislature would attempt to exercise a power which it did not possess; consequently, there is no provision of law in that State permitting the reviving of the suit against the Michigan executors. The court was without power to proceed to a valid judgment against a foreign executor, even if such executor had appeared and consented.

The authorities upon this point are fully discussed in another part of the brief, in connection with the question of privity between domiciliary executors and the administrator with the will annexed appointed in another State.

But even if the court had power to make the foreign executors parties and to summon them to appear, process for that purpose could not run outside of the State.

"Process from the tribunals of one state cannot

run into another state and summon parties there domiciled to leave its territory and to respond to proceedings against them. The publication of process or notice within the state where the tribunal sits, cannot create any greater obligation upon the non-resident to appear. Process sent to him out of of the state and process published within it, are equally unavailing in proceedings to establish his personal liability."

Pennoyer vs. Neff, 95 *U. S.*, 714.

"The constitutional requirement that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, is necessarily to be interpreted in connection with other provisions of the constitution, and therefore, no state can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are found wanting in the due process of law enjoined by the fundamental law. 'No judgment of a court is due process of law, if rendered without jurisdiction in the court or without notice to the party.'—*Scott vs. McNeal*, 154 *U. S.*, 34-46."

Old Wayne L. A. vs. McDonough, 204 *U. S.*, 15.
Wetmore vs. Carrick, 205 *U. S.*, 141-148.
Smith vs. Woolfolk, 115 *U. S.*, 143.
Freeman vs. Alderson, 119 *U. S.*, 185.
Dewey vs. DesMoines, 173 *U. S.*, 203.
Overby vs. Gordon, 177 *U. S.*, 223.
Feltch vs. Hooper, 119 *Mass.*, 52.
Howard vs. Coon, 93 *Mich.*, 443.
McEwen vs. Zenner, 38 *Mich.*, 765.

In addition to this universally recognized rule of law, the statutes in Massachusetts expressly prohibit the maintaining of a personal action without service within the commonwealth. Sec. 1, Chap. 179, R. L. of Mass., 1902, provides as follows:

"A personal action shall not be maintained against a person who is not an inhabitant of this commonwealth, unless he has been served with process *within this commonwealth*, or unless an effectual attachment of his property within this commonwealth, has been made upon the original writ, and in case of such attachment without such

> service, the judgment shall be valid to secure the application of the property so attached, to the satisfaction of the judgment, and not otherwise."

Upon both of the grounds above stated, the proceedings of the Massachusetts court after Fletcher's death, so far as the Michigan executors and the individual heirs of Fletcher are concerned, were *coram non judice.*

III.

Judge Miner's contention before the State Court that, notwithstanding the death of Fletcher, jurisdiction remained vested in the court to proceed to a final decree, without new process, is wholly without support, either in principle or authority.

Judge Miner, one of the counsel for plaintiff in error, advanced the theory before the Supreme Court of Michigan, that the Michigan executors were *potentially* before the court, and that therefore after his death, without further process, they were actually before the court, so that a judgment might be rendered against them which would be binding everywhere. This is a proposition hitherto unheard of. The mere statement of it is its sufficient refutation. It ignores entirely the fundamental fact that when death occurs, new interests arise, and it leaves out of consideration the universally accepted rule, that a pending suit is suspended by death until the new parties interested are brought into the jurisdiction of the court by legal process. Carried to its logical conclusion, this theory would permit a case to be revived upon the record and carried through to a judgment, without any notice whatsoever, which judgment would be conclusive outside of the jurisdiction which rendered it; as the omission of notice, if it is not process, would be a mere irregularity which could not be taken advantage of in a collateral proceeding.

The argument that a decree might have been rendered against Fletcher after his death, which, although manifestly improper, could only have been reversed in direct proceedings, is sufficiently answered by the record which shows that no such decree was attempted to be taken.

The decree in terms runs against parties not before the court, who were beyond its jurisdiction, and over

whom the court had never acquired jurisdiction. The court could not have rendered a valid decree against them even with their own consent.

The other proposition advanced by Judge Miner, that the executors in Michigan are estopped from questioning the validity of a decree which Fletcher may have agreed might be taken against them in Massachusetts after his death, is equally fallacious.

A man's control over his property, ceases at his death; thereafter it passes into the custody of the law and is subject to the exclusive authority of the state where the property was situated at the time of the death. That authority alone can prescribe how the estate shall descend; how claims may be established against it, and what control if any the original owner in his lifetime, may exercise over it after his death. Under Michigan laws the only control a man can exercise over his property after his death, is by will executed in the manner prescribed by law. Any agreement made during his lifetime, that his executors or administrators shall do anything respecting his property, after it has passed out of his hands and come into their control, must of necessity be ineffectual and void, unless the authority is embodied in his will, lawfully executed. Consequently no estoppel can arise from any agreement made by the decedent, respecting the control or disposition of his property after his death.

Wilkie vs. Duross, 144 *Mich.*, 243.

IV.

The contention of Mr. Geer, one of the counsel for plaintiff in error, before the State Court, that the administrator with the will annexed, appointed by the Probate Court of Suffolk County, Massachussetts, at the instance of the plaintiff, was in privity with the executors appointed by the Probate Court for the County of Wayne, Michigan, under the will, so that a decree in Massachusetts against the Massachusetts administrator with the will annexed, is binding upon the Michigan executors, is equally without support in principle or authority.

The proposition is, that it was not necessary to revive the case against the Michigan executors at all, or to give them notice; that a judgment against the Massachusetts administrator alone is binding and conclusive upon the Michigan executors because they are in privity.

The solution of this question depends upon whether the administrator with the will annexed, appointed in Massachusetts, in any sense represents, or is possessed of any authority over the Michigan estate; as persons cannot be in privity, unless there exist such mutual relations between them that the act of one can be justly attributed to the other.

The statutes of both Michigan and Massachusetts are explicit in limiting the authority granted in letters of administration issued to administrators with the will annexed, *to the property of the deceased within the state issuing them.*

> "When any will shall be allowed as mentioned in the preceding section, the probate court shall grant letters testamentary, or letters of administration with the will annexed, *and such letters testamentary or letters of administration, shall extend to all the estate of the testator in this state.*"
>
> *Mich. C. L., Sec.* 9284.
>
> "After allowing a will under the provisions of the two preceding sections, the probate court shall grant letters testamentary on such will, or letters of administration with the will annexed, *and shall proceed in the settlement of the estate which may be found in this commonwealth,* in the manner provided in Chap. 143, relative to such estaes."
>
> *R. L. Mass.*, 1902, *Chap.* 136, *Sec.* 12.

The statutes of Michigan also provide that all claims against the estate being administered in Michigan, must be presented to the commissioners on claims, and that claims which are not so presented shall be barred.

> *Mich. C. L., Secs.* 9378, 9380.

Thus it will be seen that by express provisions of law the properties of a deceased person in these two states, are required to be administered entirely independent of each other.

It should also be borne in mind that our probate laws were adopted from those of Massachusetts, and with them, according to a familiar rule, we adopted the construction put upon those laws by the courts of that state.

Campau vs. Gillett, 1 *Mich.*, 417.
Gary Probate Law, Sec. 9.

No rule is better settled in the law, than that the proceedings of the settlement of the estate of deceased persons, are substantially proceedings *in rem*, and that the jurisdiction of the state, so far as it concerns property within its territorial limits, is plenary and exclusive.

Story, Conflict of Laws, Secs. 512-13-14.

Not only the statutes, but the decisions of both Michigan and Massachusetts, are in entire accord with this universally accepted rule.

Rule in Michigan:

"Under our system the settlements of estates of deceased persons, are essentially proceedings *in rem* (Howard vs. Moore, 2 Mich., 226), as they are in most of the other states, in which the *res* is the decedent's estate and the *jus ad rem* is in the creditor. Upon the death of a person leaving creditors, the debts previously personal obligations, become immediately property obligations with all the force of a lien upon the debtor's estate." * * * (p. 51).

"It has been decided several times in this court, that all claims against estates in administration, must be established under the probate laws and that no other courts have jurisdiction to create charges against the estate, and that the probate court is the only court which can reach persons absent as well as present, through its jurisdiction *in rem.*" * * * (p. 68.)

"There is no instance in jurisprudence where constructive service is lawful except when the court acts *in rem.* No personal effect can be given to judgments without personal service. This is elementary; and accordingly when the *res* ceases to be within the jurisdiction, the jurisdiction itself ceases." (p. 69).

Lafferty vs. People's Savings Bank, 76 *Mich.*, 35.

Applying this principle the Supreme Court of Michigan has decided that the removal of a domiciliary executor by the Probate Court for Lucas County, Ohio, does not operate to remove the same person who had received ancillary letters issued by the Probate Court for Huron County, Michigan.

Mr. Justice Montgomery, in denying application for mandamus to compel the Michigan Probate Judge to remove such administrator, says:

> "Administration of estates lying within this state, is not committed by our law to foreign tribunals. Under Sec. 9284 the courts of this state are given authority to exercise a discretion in the appointment of an executor or administrator with the will annexed. If the court may appoint, it may retain. It is a startling proposition that a foreign court may interfere to remove an officer of our courts, or an appointee of such court to a position of trust. If such foreign court has not this power, it cannot indirectly cause such removal by making an order which shall bind the court. True we are bound to give full faith and credit to the determinations of the Ohio tribunal. We are not, however, required to permit the courts of a sister state to determine matters committed by the law to our jurisdiction. *While the administration in this state is ancillary, it is independent.*"

Am. Missionary Ass'n vs. Hall, 138 *Mich.*, 247.

Rule in Massachusetts:

Where a judgment had been recovered against an ancillary administrator appointed in Vermont, whose appointment had been made at the request of the executor under the will probated in Massachusetts, it was held that such administrator was not in privity with the executor, because the two were administering separate and distinct estates.

In a very well considered opinion, among other things it is stated:

> "If we look at the question of privity between the executor here and the ancillary administrator in Vermont, it is difficult to find any valid ground on which such privity can rest. The executor derives his authority from the letters testamentary

issued by the probate court here; he gives bond, to that court; is accountable to it for all his proceedings; makes his final settlement in it and is discharged by it, in conformity with the statutes of this commonwealth. The administrator derives his authority from the probate court in Vermont and is accountable to it in the same manner in which the executor is accountable to our court. The authority of the executor does not extend to the property there, nor to the doings of the administrator; nor does the authority of the administrator extend to the property here, or to the doings of the executor. When the plaintiff commenced his suit against the administrator, the executor had no right to go there and defend it. If he had been found in Vermont, he could not have been sued there. The judgment rendered in the suit was not against him, or against the testator's goods in his hands; but was simply against the administrator and the testator's goods in his hands. The courts of Vermont had no jurisdiction of the executor, or of the goods in his hands, any more than our courts would have over the administrator and the goods in his hands. It is this limitation of state jurisdiction, that creates a necessity for an administration in every state where a deceased person leaves property; and each state regulates for itself exclusively, the manner in which the estate found within its limits shall be settled."

Low vs. Bartlett, 8 *Allen*, 262.

Rule of United States Supreme Court:

"Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it; and does not *de jure* extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased in any other state. * * * On the other hand, the administrator is exclusively bound to account for all the assets which he receives under and in virtue of his administration, to the proper tribunals of the government from which he derives his authority; and the tribunals of other states have no right to interfere with or to control the application of those assets according to the *lex loci;* hence it has become an established doctrine, that an administrator

appointed in one state, cannot in his official capacity sue for any debts due to his intestate in the courts of another state; and that he is not liable to be sued in that capacity in the courts of the latter, by any creditor for any debts due there by his intestate."

Story J., Vaughn vs. Northrop, 15 *Peters,* 5.

"Two suits, one in England between the executor and the administrator of a deceased claimant, acting under English letters, and the other in Pennsylvania between the executor and another administrator of the complainant, acting under Pennsylvania letters, are suits between different parties, and neither the decree nor proceedings in the English suit, are competent evidence in the American suit."

Aspden vs. Nixon, 4 *Howard,* 467.

"Where administrations are granted to different persons in different states, they are so far deemed independent of each other, that a judgment obtained against one, will furnish no right of action against the other to affect assets received by the latter in virtue of his own administration; for in contemplation of law, there is no privity between him and the other administrator. (See Story Confl. of Law, Sec. 522; *Brodie vs. Bickley,* 2 *Rawle.*)

Stacey vs. Thrasher, 6 *Howard,* 58."
McLean vs. Meek, 18 *Howard,* 16.

The question is fully considered and finally disposed of in the case of *Johnson vs. Powers,* 139 *U. S.,* 156. In the opinion Mr. Justice Gray says:

"In *Stacey vs. Thrasher,* in which a judgment recovered in one state against an administrator appointed in that state upon an alleged debt of the intestate, was held to be incompetent evidence of the debt in a suit brought by the same plaintiff in the Circuit Court of the United States held within another state against an administrator there appointed of the same intestate. The reasons given by Mr. Justice Grier have so strong a bearing on the case before us, and on the argument of the appellant as to be worth quoting from.

"The administrator receives his authority from

the ordinary or other officer of the government where the goods of the intestate are situate, but coming into such possession by succession to the intestate, and encumbered with the duty to pay his debts, he is considered in law as in privity with him, and therefore bound or estopped by a judgment against him; yet his representation of his intestate is a qualified one and extends not beyond the assets of which the ordinary had jurisdiction. 6 Howard, 58.

"In answering the objection that to apply these principles to a judgment obtained in another state of the Union, would be to deny it the faith and credit and the effect to which it was entitled by the Constitution and laws of the United States, he observed that it was evidence and conclusive by way of estopped only between the same parties or their privies; or on the same subject-matter when the proceeding was *in rem;* and that the parties to the judgment in question were not the same; neither were they privies in blood, in law, or by estate; and proceeded as follows:

"'An administrator under grant of administration in one state stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him; but they have no privity with each other, in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, encumbered by the same debts.' 6 How., 59, 60.

"It is for those who assert this privity to show wherein it lies, and the argument for it seems to be this: That the judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situate, is liable to pay his debts; therefore the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is *in rem*, and not *in personam*, or that the estate has a sort of corporate entity and unity. But this is not true, either in fact or in legal construc-

tion. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another state, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger."

"The laws and courts of a state can only affect persons and things within their jurisdiction. Consequently both as to the administrator and the property confided to him, a judgment in another state is *res inter alios acta.* It cannot be even prima facie evidence of a debt; for if it have any effect at all, it must be as a judgment, and operate by way of estoppel." 6 How., 60, 61.

"In *Low vs. Bartlett*, above cited, following the decisions of this court, it was held that a judgment allowing a claim against the estate of a deceased person in Vermont, under statutes similar to those of Michigan, was not competent evidence of debt in a suit in equity brought in Massachusetts by the same plaintiff against an executor appointed there, and against legatees who had received money from him; the court saying:

"The judgment in Vermont was in no sense a judgment against them, nor against the property which they had received from the executor. 8 Allen, 266."

See also:

Reynolds vs. Stockton, 140 *U. S.*, 254.
R. R. vs. Gomila, 132 *U. S.*, 478.

It is interesting to note that United States Circuit Judge Putnam, the arbitrator to whom the Massachusetts case was submitted during Fletcher's lifetime, entertains the same opinion respecting this rule. In the case of *Ingersoll vs. Coram*, 127 *Fed.*, 434, he says:

"The law is settled beyond question that an ancillary administrator in one jurisdiction is not in privity with an ancillary administrator in another jurisdiction, so that no judgment by or against an ancillary administrator in Montana could avail for or against an ancillary administrator appointed by the Courts of Massachusetts,

bringing a suit in that State or in this district, although the cause of action was indentically the same. The rule is so thoroughly established that we need not dwell upon it, only to say that it has been fully recognized and enforced by the Supreme Court, in *Aspden vs. Nixon*, 4 *How.*, 467; *Stacy vs. Thrasher*, 6 *How.*, 44; *Johnson vs. Powers*, 139 *U. S.*, 156; *Carpenter vs. Strange*, 141 *U. S.*, 87, 104."

Appellant concedes the rule, so far as administrators appointed in different states are concerned, but attempts to make a distinction in the case of an administrator with the will annexed.

No distinction exists in principle. The administrator with the will annexed does not derive his appointment or authority from the will, but from the court which appoints him, and the authority conferred upon him is only such as the court making the appointment has power to grant.

The Massachusetts statute expressly limits the authority of an administrator with the will annexed appointed in that state to the property of the deceased within the commonwealth.

R. L. Mass., 1902, *Chap.* 136, *Sec.* 12.

In the present case the Michigan executors declined to take out letters in Massachusetts, believing that it was their right and duty to have claims against the Michigan estate adjudicated in accordance with the requirements of Michigan law. They were without authority to consent to submit the determination of them to a foreign tribunal. It also appears from the record that Frank B. Cotton, the administrator with the will annexed, was appointed in Massachusetts, upon the petition of Frances M. Brown, the the plaintiff in the suit against Fletcher (Rec., p. 259), and it would be exceedingly strange if the actions of an obviously hostile administrator could be held to conclude the estate here.

> "The same doctrine is as applicable to the case of executors as to that of administrators; the right in both instances depending upon the letters."
>
> *Noonan vs. Bradley*, 9 *Wade.*, 394, 400.
> *Dixon's Exrs. vs. Ramsey's Exrs.*, 3 *Cranch*, 319.
> 18 *Cyc.* 1244, *citing many cases.*

The decision of the Supreme Court of the United States in the case of *Johnson vs. Powers*, above cited, approving the case of *Low vs. Bartlett*, 8 *Allen*, 259, would seem to settle the question of privity between an administrator with the will annexed appointed in one state and an executor in another.

This decision is in accordance with the generally accepted rule upon the subject.

> "There is no privity between administrators of the same estate appointed in different jurisdictions or *between an executor in one jurisdiction and an ancillary administrator* in another, and a judgment in one is not evidence against the other for the purpose of affecting assets received by the latter under his administration, and cannot be made the basis of an action against him, even where the offices are held by the same person."
>
> 18 *Cyc.*, 1226.
> *Allsop vs. Mather*, 8 *Conn.*, 584.
> *Ela vs. Edwards*, 95 *Mass.*, 49.
> *Clark vs. Blockington*, 110 *Mass.*, 369.
> *Ex-parte Brown*, 2 *Brad* (*N. Y.*), 22.

A distinction is also claimed because the suit was pending at the time of Fletcher's death.

No reason for such distinction is pointed out, and no case is cited, except *Creighton vs. Murphy*, 8 *Neb.*, 349. An inspection of this case shows that it was decided without any consideration of the principles involved, or any examination of adjudicated cases bearing upon them, and it amounts to nothing more than the *ipse dixit* of the Nebraska judge who rendered the opinion.

On the other hand, it is obvious that the same disability must exist whether the suit be an original or a revived one. In either case the action is a proceeding to obtain a judgment against a representative who has no legal status outside of the jurisdiction of his appointment.

Where a suit was attempted to be revived in Massachusetts against an executor appointed in California by service upon him within the former state, it was held by Justice Clifford of the United States Supreme Court, that the executor could not be sued outside of the jurisdiction of his appointment; and in answer to the claim made that

a different rule should obtain where the suit has been begun during the testator's lifetime, says:

> "All of the reasons assigned in the adjudged cases to show that an executor or administrator cannot be made an original defendant in a state other than the one from which he derives his authority, apply with equal force against making him a respondent to a suit in equity abated by the death of his testator or intestate."
>
> *Mellus vs. Thompson*, 1 *Clifford*, 133.

Where a foreign administrator attempted to revive a suit in Michigan, commenced by his intestate in his lifetime, it was held that he had no power to do so, because he was not authorized to bring suits within this state.

Mr. Justice Cooley says:

> "Where however, the action was originally brought by a party suing in his own right, and his death is suggested of record, different considerations prevail. The proceeding to substitute an administrator, is entirely a matter of statutory regulation, and its effect upon the rights of parties cannot properly be extended beyond what the statute has provided, on any mere fanciful analogies to common law practice."
>
> *Vickery vs. Beir*, 16 *Mich.*, 50, 53.

A foreign executor cannot revive a suit as he cannot sue or be sued in his representative capacity, outside of the jurisdiction which appointed him.

Flandrow vs. Hammond, 13 *N. Y., Appl.*, 326.

A suit can only be revived against such persons as are lawfully empowered to defend the same within the jurisdiction.

Greer vs. Ferguson, 56 *Ark.*, 331.
Judy vs. Kelley, 11 *Ill.*, 211.
McGancy vs. Darnall, 32 *Ill. Appl.*, 206.
Rentschler vs. Jamison, 6 *Mo. App.*, 135.

As bearing upon the general proposition see also,

Reynolds vs. McMullen, 55 *Mich.*, 568, 584.
Woodruff vs. Young, 43 *Mich.*, 548.
Sheldon s. Rice, 30 *Mich.*, 296.
Thayer vs. Lane, 1 *Walker's Ch.*, 199.
Estate of Crawford, 68 *Ohio St.*, 58, 83.

V.

The covenants contained in the agreement of submission could not confer upon the Massachusetts Court the power, which it did not otherwise possess, to render a judgment against the Michigan executors over whom it had no authority and who had not been brought within its jurisdiction by legal process.

Properly speaking, the covenants contained in the Articles of Submission do not constitute a contract at all in the proper sense of the term, and in legal contemplation are not effective except in the case in which they were made. They were rather in the nature of rules or orders in the case, made with the consent of the parties, and were of no force or effect without the sanction of the Court. When once made they could not have been changed without permission of the Court, and they can have only such force and effect as the Court had power to prescribe.

Woodbury vs. Proctor, 9 *Gray*, 19.
Wily vs. Durgan, 118 *Mass.*, 64.
Seary vs. Beckler, 132 *Mass.*, 203.

The articles themselves, therefore, do not constitute a contract.

Mr. Geer's argument, before the state court proceeded upon the theory that the Articles of Submission constituted an independent contract between the parties, irrespective of the suit in which they were made.

The first and most obvious answer to this contention is that the claim under consideration is not based upon any violation of an agreement, but rests solely upon the decree itself.

But even if such were the case, the Articles cannot lawfully be given the effect claimed for them. The covenants

contained in the Articles are not properly susceptible of the construction which has been placed upon them by the Appellant. In these Articles, Fletcher covenants and agrees for himself, his heirs, executors and administrators that they will abide by and faithfully fulfill and perform any award which may be made by the arbitrator.

It is also agreed that the decease of any party shall not revoke the submission, but that the arbitration shall continue, and that the legal representatives of Brown and Fletcher shall be bound by the final award therein.

The covenant to abide by and perform any award is the conventional and customary form used in submissions of this character, and cannot be considered as indicating any intention to give any greater force or effect to the proceedings in the suit in which it was made than would result from a final judgment.

> "An agreement that an award shall be final and conclusive is powerless to take away the right to assail its validity in the ordinary way and upon ordinary grounds. The words are commonly used to express the intention of the parties to be bound by the award, but they are of no greater force."
>
> *Morse on Arbitration and Awards*, 87 *and cases cited.*

> "An agreement that an award shall be final and conclusive does not prohibit the filing of exceptions, etc., being words common to every rule of reference."
>
> *Mussina vs. Hettzog*, 5 *Binn.* (*Pa.*), 387.

The same may be said of the covenant that the decease of a party shall not revoke the submission but that the arbitration shall continue. This also is a usual covenant, and, when properly construed, can only mean that the case can be revived and proceed in the customary manner permitted by the laws of the State where the suit is pending, without losing the benefit of the proceedings thereto had before the arbitrator.

The question at one time was a mooted one in Massachusetts, whether death did not revoke a reference of this kind and all benefit of it be lost, which probably accounts for the use of the provision in such cases, but it has since been settled that because the reference is a step in the

suit, the submission is not revoked by death, but the benefit of the proceedings had under it may be availed of in a revived suit. In other words, the same effect is given to it as in the case of a reference to a master, from which it does not essentially differ.

Bacon vs. Crandon, 15 *Pick.,* 19.

The plaintiff in error, however, attempts to put a much broader construction upon these covenants, and the claim is that the covenants constitute an agreement on the part of Fletcher that his Michigan executors, in case of his death, shall appear in the revived suit in Massachusetts, and in case they fail to do so, that the Massachusetts Court, notwithstanding such failure, may proceed to a decree which shall be binding upon the estate in Michigan.

It is submitted that under any reasonable construction of the covenants, no such agreement as above stated can possibly be found in the articles.

But granting that an agreement had been made expressly in the terms stated, it would obviously be ineffectual and void.

An agreement that the Massachusetts Court shall have authority to enter a decree which shall be binding upon persons not lawfully brought before it and upon an estate situated without its jurisdiction is legally impossible. The State of Massachusetts, itself, is without power to confer such authority upon its courts, and the Michigan laws expressly prohibit the adjustment of claims against estates within its jurisdiction in any other way than that designated by its own laws.

The executors, themselves, could not have consented that the Massachusetts court exercise such a power, much less could Fletcher during his lifetime make such an agreement. Jurisdiction in proceedings *in rem* cannot be conferred by consent.

Cooley's Constitutional Limitations, 491.

> "It has been decided that consent will not confer jurisdiction, particularly as to the *subject-matter to be determined* (italics are the Court's), 8 John. Rep, 409; 13 Id., 218; 14 Id., 432; 17 Id., 471. Where jurisdiction is unqualifiedly withheld, even consent or the confession of judgment will not render the proceedings valid, though it would take

away a mere error. See the case of an executor confessing judgment in 3 Caine's Rep., 129, and see where a justice, by consent, tries the title to land (citing cases)."

Spear vs. Carter et al., 1 *Mich.*, 19-23.
Youngblood vs. Sexton, 32 *Mich.*, 406-409.
Allen vs. Carpenter, 15 *Mich.*, 25-32.
Thompson vs. Michigan Mutual Benefit Assn., 52 *Mich.*, 522-524.
Kirkwood vs. Hoxie, 95 *Mich.*, 62.

The rule is the same in other States, including Massachusetts.

"Consent of parties may in a certain sense give jurisdiction of the person, but it cannot create a jurisdiction over the cause and subject-matter which is not vested in the court by law."

Santom vs. Ballard, 133 *Mass.*, 465.

"Where a statute prohibits jurisdiction, or where a prohibition is necessarily implied, by being vested exclusively in another tribunal, no consent can give jurisdiction."

Batchelder vs. Currier, 45 *N. H.*, 460-463.
State vs. Richmond, 26 *N. H.*, 232.

"It has been long and correctly settled, that not even a direct assent by the parties, can confer jurisdiction or render the judgment of a tribunal in a matter over which it has not by law any cognizance, effectual."

Dudley vs. Mayhew, 3 *N. Y.*, 9.
Morrison vs. Weaver, 4 *S. & R. (Pa.)*, 190.
Agee vs. Dement, 1 *Humph. (Tenn.)*, 332.

Following this principle, it is held that even though an executor or administrator appear in a suit pending in a State other than that of his appointment, such appearance is wholly unauthorized and a judgment resulting from it is absolutely null and void.

Judy Admr. vs. Kelly, 11 *Ill.*, 211.
Greer vs. Ferguson, 56 *Ark.*, 324.
Flandrow vs. Hammond, 13 *N. Y. App. Div.*, 325.

"The executors and executrix of William P. Hall, who after his death were by consent made parties

defendant to represent his interests, as appears in the statement of the case, cannot by virtue of their authority as such, from the court of South Carolina, defend this suit. It would be idle to argue that consent can give the right or power."

Sloan vs. Sloan, 21 *Fla.*, 589-596.
Elling vs. First Nat'l Bank, 173 *Ill.*, 368-387.
Freeman on Judgments, Sec. 120, *and cases cited.*
Foster vs. Durant, 2 *Cush.*, 544.
Woodbury vs. Proctor, 9 *Gray*, 18.
Hubbell vs. Bissell, 15 *Gray.*, 551.
17 *Am. & Eng. Encyc. of Law*, 2*nd Ed.*, 1060.

The effect of such an agreement would be to deprive the estate of the right which the law provides to have claims against it adjudicated within the jurisdiction in which it is situated. No one can lawfully agree in advance to forfeit his right to the protection of the laws or of the courts, and if he cannot do so in his own case, much less has he the power to make a valid agreement of that character which it is contemplated shall bind his estate.

Insurance Co. vs. Morse, 20 *Wall.*, 450.

It is respectfully submitted that the judgment of the Supreme Court of the State of Michigan should be affirmed.

HENRY M. CAMPBELL,
Counsel for Defendant in Error.

BROWN *v.* FLETCHER'S ESTATE.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 220. Argued April 30, 1908.—Decided May 18, 1908.

The full faith and credit clause of the Federal Constitution does not preclude the courts of a State in which the judgment of a sister State is presented from inquiry as to jurisdiction of the court by which the judgment is rendered, nor is this inquiry precluded by a recital in the record of jurisdictional facts.

Every State has exclusive jurisdiction over property within its borders, and where testator has property in more than one State each State has jurisdiction over the property within its limits and can, in its own courts, provide for the disposition thereof in conformity with its laws.

There is no privity between the executor and an administrator with the will annexed appointed in another State which makes a decree in a court of such State against the latter binding under the full faith and credit clause of the Federal Constitution upon the former in the courts of the State in which such executor is appointed.

Where a party dies pending a suit which is subsequently revived against an administrator with the will annexed appointed in the State in the courts of which the suit is pending, the judgment is binding only upon the parties against which it is revived and who are within the jurisdiction of the court, and the courts of another State are not bound under the full faith and credit clause of the Federal Constitution to give effect to such judgment against the executors of such deceased party; and this applies to a judgment entered on an arbitration had in pursuance of a stipulation that it should be conducted under control of the court and that it should continue notwithstanding the decease of either party.

Quære as to the effect of the death of either party on an arbitration under a contract of submission made independently of judicial proceedings where the contract provides that the arbitration shall in such event continue and the award be binding upon the representatives of the deceased party.

146 Michigan, 401, affirmed.

On April 24, 1874, a bill of complaint in a suit for an accounting was filed in the Supreme Judicial Court of Massachusetts, sitting in equity, against George N. Fletcher, of Detroit, Michigan. The latter personally appeared and defended the suit. Without going into the details of the protracted litigation in Massachusetts, or showing how the plaintiff in error became at last the plaintiff in whose favor the Massachusetts court entered judgment, it is enough to say that on April 4, 1892, an agreement was made between the parties for submitting to arbitration all the claims and demands either party might have against the other; providing that the arbitration should be under rule of court, and that it should not operate as a discontinuance of the suit. It was further stipulated that the decease of either party should not terminate the submission, but that the arbitration should continue, and his successors and legal representatives should be bound by the final award therein. On October 18, 1893, the Hon. William L. Putnam was selected as arbitrator. On May 22, 1894, he filed a preliminary award. After this, and before a final award, Fletcher died, leaving a will, which was probated in the Probate Court of Wayne County, Michigan. Letters testamentary were issued to his executors, citizens of Michigan, who qualified as such, and took possession of the decedent's estate in Michi-

gan. His principal estate, as well as his domicil, was in Michigan, but he owned two small tracts in Massachusetts. The Probate Court of Middlesex County, Massachusetts, by proceedings, regular in form, appointed Frank B. Cotton, a citizen of that State, administrator with the will annexed. The Massachusetts property was afterwards sold by that administrator for $350.

After the death of Fletcher the principal suit was revived, the administrator entered his appearance therein, and an order was made by the Massachusetts court that the executors and the children and residuary legatees of the decedent be notified to appear, and that in default thereof the arbitration proceed. They were notified by personal service of the order in the State of Michigan, but did not appear. The arbitration proceeded in their absence and a final award was made. It should also be stated that on his death Fletcher's counsel withdrew their appearance in the case. On April 14, 1903, the Massachusetts Supreme Judicial Court confirmed the awards of the arbitrator, and adjudged that Albert W. Brown recover from Frank B. Cotton, administrator with the will annexed, the sum of $394,372.87 and $4,495.85 as interest and the costs of suit, afterwards taxed as $5,385.40. It was further adjudged and decreed that the Michigan executors of the last will were bound by the final award of the arbitrator and liable to pay to Albert W. Brown the aforesaid sums; that the legal representatives of George N. Fletcher were likewise bound by the award and liable for any deficiency. Thereafter the decree of the Massachusetts court was filed in the Probate Court of Wayne County, Michigan, as evidence of a claim against the estate. It was disallowed by that court, and on appeal to the Supreme Court of Michigan the disallowance was affirmed. 146 Michigan, 401. Thereupon the case was brought here on error.

Mr. Harrison Geer and *Mr. John Miner* for plaintiff in error: The Massachusetts court in equity having had jurisdiction

in Fletcher's lifetime over the subject-matter and the parties to the suit, and on his death the suit having been duly revived, the decree is conclusive evidence of debt in this proceeding.

The death of a party to a suit in equity does not amount to a determination of the suit, but merely suspends the proceedings until new parties are brought before the court. When the suit is revived, the cause proceeds to its regular determination. 5 Am. & Eng. Ency. of Pl. & Pr. 790, 791; Story's Equity Pl. & Pr. § 354; *Clarke* v. *Mathewson*, 12 Pet. 171; *Mellus* v. *Thompson*, 1 Cliff. 129; *Hoxie* v. *Carr*, 1 Sumn. (U. S.) 178.

While the right of the Massachusetts court to proceed in the suit was suspended by Fletcher's death, the court was not thereby divested of jurisdiction. It retained the jurisdiction possessed by it in the lifetime of Fletcher until the cause was finally determined. 2 Black on Judg. § 912; Freeman on Judg. § 142; *Sanford* v. *Sanford*, 28 Connecticut, 6; *Evans* v. *Black*, 5 Arkansas, 429; *Quarl* v. *Abbott*, 102 Indiana, 239, 240; *Gray* v. *Bowles*, 74 Missouri, 419; *Nations* v. *Johnson*, 24 How. 202. See also *Smith* v. *Engle*, 44 Iowa, 265; *Laing* v. *Rigney*, 160 U. S. 531; *Fitzsimmons* v. *Johnson*, 90 Tennessee, 416; *Field* v. *Judge*, 124 Michigan, 68.

The court having possessed jurisdiction of the cause until it was finally determined, its exercise of that jurisdiction cannot be questioned in a collateral proceeding like the one at bar. There is a marked distinction between the jurisdiction of a court and its exercise of that jurisdiction. If it has no jurisdiction, any judgment rendered by it is absolutely void, and may be attacked in a collateral proceeding. If it has jurisdiction, but exercises it wrongfully, its judgment may be reversed on appeal, but it cannot be questioned in a collateral proceeding. 17 Am. & Eng. Ency. of Law (2d ed.), 1042; *Paine* v. *Mooreland*, 15 Ohio, 435; *Chase* v. *Christianson*, 41 California, 255; *Laing* v. *Rigney*, 160 U. S. 531; *Babb* v. *Bruere*, 23 Mo. App. 606; *Hagerman* v. *Sutton*, 91 Missouri, 519.

The suit having been properly revived against the administrator with the will annexed, and the court having retained the jurisdiction that it possessed in Fletcher's lifetime until the cause was finally determined, the decree against such administrator is valid and conclusive evidence of debt in this proceeding against his estate in Michigan.

Even if the suit had not been revived after Fletcher's death the decree would be merely voidable, and not void, nor subject to attack in a collateral proceeding like the case at bar. While a court ought to cease the exercise of its jurisdiction over a party on his death, its failure to do so can only be corrected in a direct proceeding. The court having possessed jurisdiction in the lifetime of the party, and having retained such jurisdiction until the final determination of the suit, its exercise of that jurisdiction, even after the death of a party, is not subject to collateral attack. 2 Black on Judg. § 200; Freeman on Judg. §§ 140–153; 17 Am. & Eng. Ency. of Law (2d ed.), 1070; *New Orleans* v. *Gaines, Admr.*, 138 U. S. 612; *Reid* v. *Holmes*, 127 Massachusetts, 326; *Collins* v. *Mitchell*, 5 Florida, 364; *Neale* v. *Utz*, 75 Virginia, 480; *Yaple* v. *Titus*, 41 Pa. St. 195; *Carr* v. *Townsend's Ex'rs*, 63 Pa. St. 202; *Swasey* v. *Antram*, 24 Ohio St. 87; *Claflin's Ex'r* v. *Dunne*, 129 Illinois, 241; *Mitchell* v. *Schoonover*, 16 Oregon, 211; *Hayes* v. *Shaw*, 20 Minnesota, 405; *Stocking* v. *Hanson*, 22 Minnesota, 542; *Watt* v. *Brookover*, 29 Am. St. Rep. 816*n*; *Webber* v. *Stanton*, 1 Mich. N. P. 97.

Fletcher's Michigan executors and the administrator with the will annexed of his estate in Massachusetts are in such privity that the decree is conclusive evidence of debt in this proceeding.

Both the executors and the administrator with the will annexed are in privity with their testator, Fletcher. 23 Am. & Eng. Ency. of Law (2d ed.), 101; Words and Phrases, Vol. 6, pp. 5606–5611; 1 Greenl. Ev. § 523; *Litchfield* v. *Goodnow*, 123 U. S. 549; *Williams* v. *Barkley*, 58 N. E. Rep. 768; *Pennington* v. *Hunt*, 20 Fed. Rep. 195; *Hill* v. *Tucker*, 13 How.

458; *Goodall* v. *Tucker*, 13 How. 469; *Latine* v. *Clements*, 3 Kelly (Georgia), 426.

Mr. Henry M. Campbell for defendant in error:

The contention that the administrator with the will annexed, appointed by the Probate Court of Suffolk County, Massachusetts, at the instance of the plaintiff, was in privity with the executors appointed by the Probate Court for the County of Wayne, Michigan, under the will, so that a decree in Massachusetts against the Massachusetts administrator with the will annexed, is binding upon the Michigan executors, is without support in principle or authority. *Campau* v. *Gillett*, 1 Michigan, 417; Gary, Probate Law, § 9; Story, Conflict of Laws, §§ 512, 513, 514; *Lafferty* v. *People's Savings Bank*, 76 Michigan, 35; *Am. Missionary Ass'n* v. *Hall*, 138 Michigan, 247; *Low* v. *Bartlett*, 8 Allen, 262; *Vaughn* v. *Northrop*, 15 Peters, 5; *Aspden* v. *Nixon*, 4 How. 467; *Stacey* v. *Thrasher*, 6 How. 58; *McLean* v. *Meek*, 18 How. 16; *Johnson* v. *Powers*, 139 U. S. 156.

The covenants contained in the agreement of submission could not confer upon the Massachusetts court the power, which it did not otherwise possess, to render a judgment against the Michigan executors over whom it had no authority and who had not been brought within its jurisdiction by legal process. *Woodbury* v. *Proctor*, 9 Gray, 19; *Wily* v. *Durgan*, 118 Massachusetts, 64; *Scavy* v. *Beckler*, 132 Massachusetts, 203; *Mussina* v. *Hettzog*, 5 Binn. (Pa.) 387.

An agreement that the Massachusetts court shall have authority to enter a decree which shall be binding upon persons not lawfully brought before it and upon an estate situated without its jurisdiction, is legally impossible. The State of Massachusetts, itself, is without power to confer such authority upon its courts, and the Michigan laws expressly prohibit the adjustment of claims against estates within its jurisdiction in any other way than that designated by its own laws. Cooley's Constitutional Limitations, 491; *Spear* v. *Carter et al.*, 1 Michi-

gan, 19, 23; *Youngblood* v. *Sexton*, 32 Michigan, 406, 409; *Allen* v. *Carpenter*, 15 Michigan, 25, 32; *Thompson* v. *Michigan Mutual Benefit Assn.*, 52 Michigan, 522, 524; *Kirkwood* v. *Hoxie*, 95 Michigan, 62; *Santom* v. *Ballard*, 133 Massachusetts, 465; *Batchelder* v. *Currier*, 45 N. H. 460, 463; *State* v. *Richmond*, 26 N. H. 232; *Dudley* v. *Mayhew*, 3 N. Y. 9; *Morrison* v. *Weaver*, 4 S. & R. (Pa.), 190; *Agee* v. *Dement*, 1 Humph. (Tenn.) 332; *Judy, Adm'r*, v. *Kelly*, 11 Illinois, 211; *Greer* v. *Ferguson*, 56 Arkansas, 324; *Flandrow* v. *Hammond*, 13 N. Y. App. Div. 325; *Sloan* v. *Sloan*, 21 Florida, 589–596; *Elling* v. *First Nat'l Bank*, 173 Illinois, 368, 387; Freeman on Judgments, § 120, and cases cited; *Foster* v. *Durant*, 2 Cush. 544; *Woodbury* v. *Proctor*, 9 Gray, 18; *Hubbell* v. *Bissell*, 15 Gray, 551; 17 Am. & Eng. Ency. of Law (2d ed.), 1060.

Mr. Justice Brewer, after making the foregoing statement, delivered the opinion of the court.

The Federal question presented is, whether the Michigan courts gave force and effect to the first section of Article IV of the Federal Constitution, which provides that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." That this is a Federal question is not open to doubt. *Huntington* v. *Attrill*, 146 U. S. 657, 666, and cases cited.

The constitutional provision does not preclude the courts of a State in which the judgment of a sister State is presented from inquiry as to the jurisdiction of the court by which the judgment was rendered. See the elaborate opinion by Mr. Justice Bradley, speaking for the court, in *Thompson* v. *Whitman*, 18 Wall. 457. That opinion has been followed in many cases, among which may be named *Simmons* v. *Saul*, 138 U. S. 439, 448; *Reynolds* v. *Stockton*, 140 U. S. 254, 265; *Thormann* v. *Frame*, 176 U. S. 350. Even record recitals of jurisdictional facts do not preclude oral testimony as to the existence of those facts. *Knowles* v. *Gaslight &c. Co.*, 19 Wall.

58, 61; *Pennoyer* v. *Neff*, 95 U. S. 714, 730; *Cooper* v. *Newell*, 173 U. S. 555, 566.

Every State has exclusive jurisdiction over the property within its borders. *Overby* v. *Gordon*, 177 U. S. 214. We make this extract from the opinion of Mr. Justice White in that case, p. 222:

"To quote the language of Mr. Chief Justice Marshall, in *Rose* v. *Himely*, 4 Cranch, 241, 277: 'It is repugnant to every idea of a proceeding *in rem* to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely *ex parte*.'

"As said also in *Pennoyer* v. *Neff*, 95 U. S. 714, 722: 'Except as restrained and limited by the Constitution, the several States of the Union possess and exercise the authority of independent States, and two well-established principles of public law respecting the jurisdiction of an independent State over persons and property are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. Any exertion of authority of this sort beyond this limit, says Story, is a mere nullity, and incapable of binding such persons or property in any other tribunals. Story, Confl. Laws, s. 539.' "